No. 88-1682

Supreme Court, U.S.
FILED
APR 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

EDWIN A. SHERIDAN
DOHERTY, SHERIDAN & GRIMALDI
8408 Arlington Boulevard
Suite 200
Fairfax, Virginia 22031
(703) 698-7700
Counsel for Petitioner KBR Corporation

WALTER A. SMITH, JR.*
ROBERT B. CAVE
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
Co-Counsel for All Petitioners

* Counsel of Record

[List of Counsel Continued on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JAMES C. GREGG
MACLEAY & LYNCH, P.C.
1625 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 785-0123
Counsel for Petitioner
Associated Builders, Inc.

JOSEPH P. DYER
JOHN A. SUTHERLAND, JR.
SICILIANO, ELLIS, DYER
& BOCCAROSSE
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692
Counsel for Petitioner
Faith Construction Co.

QUESTIONS PRESENTED

In *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), this Court definitively construed the meaning of statutory language in a nationally-applicable federal law which had been incorporated in a local District of Columbia law. In the present cases, the District of Columbia Court of Appeals has expressly refused to follow this Court's construction of that statutory language and has held the language to have the *opposite meaning* from that determined by this Court. That court has furthermore declared that it—not this Court—is the "final arbiter" of all local D.C. laws and that this Court has no jurisdiction to review and overturn the D.C. Court of Appeals' construction of such laws. The questions presented are:

1. Does this Court's certiorari jurisdiction under 28 U.S.C. § 1257 include claims made under statutes that apply only within the District of Columbia?

2. May the D.C. Court of Appeals refuse to follow this Court's definitive construction of a local D.C. law?

3. May the D.C. Court of Appeals reject this Court's construction of federal provisions adopted in a D.C. law in the absence of an affirmative indication that the Congress or the D.C. Council intended those provisions to have a meaning different from that determined by this Court?

4. Has the D.C. Court of Appeals' decision subverted the prerogative of the Congress and the D.C. Council to make laws for the District of Columbia?

LIST OF PARTIES

Clarence Meiggs and Carolyn Meiggs were appellants in No. 85-577 before the District of Columbia Court of Appeals. Terry Frazier and Delores Frazier were appellants in No. 86-257. Harry Hobbs and Shirley Hobbs were appellees in No. 86-185, but after consolidation of the cases were arbitrarily considered to be *amici curiae* in support of appellants in Nos. 85-577 and 86-257.*

Associated Builders, Inc. was appellee in No. 85-577. Faith Construction Co. was appellee in No. 86-257. KBR Corporation was appellant in No. 86-185, but after consolidation was considered to be *amicus curiae* in support of appellees in Nos. 85-577 and 86-257. *See* n.*.

---

* In its May 1, 1986 Order consolidating the cases, the Court of Appeals "[ordered] that the appeals in Nos. 85-577 and 86-257 be consolidated," that the parties in No. 86-185 would "be bound by the decision of the court with respect to the consolidated appeals," and that all parties would have full appeal rights with respect to the court's decision. Order at 2 (May 1, 1986).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTES	1
STATEMENT OF THE CASE	2
A. The *Johnson* Decision	2
B. The 1984 Amendments to the Longshore Act	6
C. The Inapplicability of the 1984 Amendments to the District of Columbia	6
D. The Present Cases	7
1. The *Estep* Decision	8
2. The *Meiggs* Decision	11
3. Rehearing Denials in *Estep* and *Meiggs*	13
REASONS FOR GRANTING THE WRIT	13
1. The Court Should Grant Certiorari to Clarify Its Jurisdiction Over Decisions of the D.C. Court of Appeals	14
2. The Court Should Grant Certiorari to Preserve the Integrity of Its Decisions and to Clarify Its "Deference" Policy with Regard to D.C. Court of Appeals' Decisions	19
3. The Court Should Grant Certiorari to Define the D.C. Court of Appeals' Authority in Interpreting D.C. Statutes Patterned on a Federal Statute	21
4. The Court Should Grant Certiorari to Preserve the Authority of the Congress and the D.C. Council to Make Laws for the District of Columbia	25
CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

Adam v. Mount Pleasant Bank & Trust Co., 340 N.W.2d 251 (Iowa 1983) 22
Allen v. United States, 625 F. Supp. 841 (D.D.C. 1986) 12
Airport Inn, Inc. v. Nebraska Equal Opportunity Comm'n, 353 N.W.2d 727 (Neb. 1984) 22
Apodaca v. State, 627 P.2d 1023 (Wyo. 1981) 23
Benavidez v. Benavidez, 660 P.2d 1017 (N.M. 1983) 22
Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987) 26
Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 25
City of Greenwood v. Peacock, 384 U.S. 808 (1966) 26
Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955) 24
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 24
Davis v. Michigan Dep't of Treasury, 57 U.S.L.W. 4389 (U.S. Mar. 28, 1989) 26
Del Vecchio v. Bowers, 296 U.S. 280 (1935) 19, 20
Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983) 24
DiNicola v. George Hyman Constr. Co., 407 A.2d 670 (D.C. 1979) ..... *passim*
Dreyfus Special Income Fund, Inc. v. New York State Tax Comm'n, 514 N.Y.S.2d 130 (N.Y. App. Div. 1987), *aff'd*, 528 N.E.2d 509 (N.Y. 1988) 22, 23
Faulk v. State's Attorney for Harford County, 474 A.2d 880 (Md. 1984) 22
Ford v. United States, No. 84-3082 (D.D.C. Mar. 22, 1985) 11
Fourco Glass Prods. Co. v. Transmirra Corp., 353 U.S. 222 (1956) 24
Franklin v. First Money, Inc., 427 F. Supp. 66 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979) 26
Gardner v. State, 549 A.2d 1171 (Md. Ct. Spec. App. 1988) 22

TABLE OF AUTHORITIES—Continued

Page

Garvin v. Alumax of S.C., Inc., 787 F.2d 910 (4th Cir. 1986), *cert. denied*, 479 U.S. 914 (1986) 28
Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988) 1
Gray v. Marshall County Bd. of Educ., 367 S.E.2d 751 (W. Va. 1988) 23
Herzberg v. Finch, 321 F. Supp. 1367 (S.D.N.Y. 1971) 26
Howard v. Town of Burlington, 506 N.E.2d 102 (Mass. 1987) 22
In re Local 1201, AFSCME, Rutland Dep't of Pub. Works, 469 A.2d 1176 (Vt. 1983) 23
Johnson v. Bechtel Assocs. Professional Corp., 717 F.2d 574 (D.C. Cir. 1983), *rev'd*, 467 U.S. 925 (1984) 3
Keener v. Washington Metropolitan Area Transit Authority, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) ..... *passim*
Key v. Doyle, 434 U.S. 59 (1977) 16, 17, 18
Lenaerts v. Department of Employment Servs., 545 A.2d 1234 (D.C. 1988) 25
Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149 (La. 1986) 22
Louviere v. Marathon Oil Co., 755 F.2d 428 (5th Cir. 1985) 28
Marchant v. Hamilton, 309 S.E.2d 781 (S.C. Ct. App. 1983) 23
M.A.P. v. Ryan, 285 A.2d 310 (D.C. 1971) 18
Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 1
Mitchell v. Forsyth, 472 U.S. 511 (1985) 1
Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973) 26
Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237 (3d Cir.), *cert. denied*, 108 S. Ct. 452 (1987) 27
O'Connell v. Maryland Steel Erectors, Inc., 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Oppenheimer & Co. v. Young, 456 So. 2d 1175 (Fla. 1984), *vacated on other grounds*, 470 U.S. 1078 (1985) 21-22
Palmore v. United States, 411 U.S. 389 (1973) ..16, 17, 18
People v. Wahl, 716 P.2d 123 (Colo. 1986) 21
Pernell v. Southall Realty, 416 U.S. 363 (1974) .....*passim*
Rubin v. United States, 449 U.S. 424 (1981) 26
SCA Constr. Supply v. Aetna Casualty & Surety Co., 754 P.2d 1339 (Ariz. 1988) 21
State v. Earls, 752 P.2d 402 (Wash. Ct. App. 1988) 23
State v. Gallant, 764 P.2d 920 (Or. 1988) 22, 23
State v. Kirk, 699 S.W.2d 814 (Tenn. Crim. App. 1985), *cert. denied*, 475 U.S. 1023 (1986) 23
State v. Thompson, 745 P.2d 1087 (Idaho Ct. App. 1987), *aff'd in part and rev'd in part on other grounds*, 760 P.2d 1162 (Idaho 1988) 22
Stephens v. Coldwell Banker Commercial Group, Inc., 199 Cal. App. 3d 1394, 245 Cal. Rptr. 606 (1988) 21
Stokes v. George Hyman Constr. Co., No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir. Jan. 24, 1985) 12
Stone v. Lynch, 315 S.E.2d 350 (N.C. Ct. App. 1984), *aff'd*, 325 S.E.2d 238 (N.C. 1985) 22, 23
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 26
United States v. Missouri Pac. R.R. Co., 278 U.S. 269 (1929) 26
United States v. Raynor, 302 U.S. 540 (1938) 25
Virginia Dep't of Labor & Indus. v. Westmoreland Coal Co., 353 S.E.2d 758 (Va. 1987) 23
Wapella Educ. Ass'n, IEA-NWA v. Illinois Educ. Labor Relations Bd., 531 N.E.2d 1371 (Ill. App. Ct. 1988) 22
Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925 (1984) .....*passim*
Webb v. Montana Masonry Constr. Co., 761 P.2d 343 (Mont. 1988) 28

TABLE OF AUTHORITIES—Continued

Page

Whalen v. United States, 445 U.S. 684 (1980) ..... *passim*
Wilbur v. United States, 284 U.S. 231 (1931) 26

Constitutional Provision:

U.S. Const., art. I, § 8, cl. 17 ..... 8-9, 15

Statutes:

Conn. Gen. Stat. § 31-291 (1988) 27
District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, §§ 602(c)(1), (c)(2), 87 Stat. 774, 987 (current version at D.C. Code Ann. §§ 1-233(c)(1), 1-233(c)(2) (1987)) 15
District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) ..... *passim*
District of Columbia Workmen's Compensation Act of 1928, D.C. Code §§ 36-501 *et seq.* (1973) ..*passim*
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 904, 905 (Supp. IV 1986) ..... *passim*
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982) ..... *passim*
28 U.S.C.A. §§ 1257(a)-1257(b) (Supp. 3 Oct. 1988) 1, 16
28 U.S.C. §§ 1257(1)-1257(3) (1982) ..... *passim*
Virgin Island Workmen's Compensation Act, Bill 498, 16th Legislature § 1(a) (1986) (to be codified at 24 V.I.C. § 284(b)) 27

Congressional Material:

H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess., *reprinted in* 1984 *U.S. Code Cong. & Admin. News* 2771 6

Other Authority:

2A A. Larson, *The Law of Workmen's Compensation* (1988) 29

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Associated Builders, Inc., Faith Construction Company, and KBR Corporation petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in these consolidated cases.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 545 A.2d 631 and is reprinted in the appendix hereto ("App.") at 1a-17a. The orders and memorandum opinion of the Superior Court of the District of Columbia are unreported and are reprinted at App. 18a-19a, 20a-22a, and 23a-31a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1988. App. 32a-34a. That court's order denying a petition for rehearing and petition for rehearing *en banc* was entered on January 18, 1989. App. 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).[1] The judgment of the Court of Appeals is "final" within the meaning of 28 U.S.C. § 1257. *See, e.g., Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1708-09 (1988); *Mitchell v. Forsyth*, 472 U.S. 511, 525 & n.8 (1985); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963).

RELEVANT STATUTES

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, the District of Columbia Workers' Compensation Act of 1979, and 28 U.S.C. § 1257 are reprinted in the Appendix at App. 74a-77a.

---

[1] Because the Court of Appeals' judgment was entered prior to the effective date of the June 27, 1988 amendment to § 1257, certiorari is sought under unamended § 1257(3), rather than amended § 1257(a).

STATEMENT OF THE CASE

These three consolidated cases involve contractors claiming immunity under the District of Columbia workers' compensation statute from tort suits brought by injured employees. The contractors' entitlement to immunity turns on the meaning of statutory language which this Court definitively construed in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984). *Johnson* declared the intent of that language to be "clear" and its meaning "plain," and held that under the language the contractors are entitled to immunity. *Id.* at 936, 938, 940-41.

In the present cases, however, the D.C. Court of Appeals has held that the language in fact has the opposite meaning, that this Court was wrong in *Johnson*, that the D.C. Court of Appeals is the "final arbiter" of this question and therefore need not follow *Johnson* if it disagrees with this Court, and that this Court has no power to review and overturn the D.C. Court of Appeals' decision in these cases. Based on this reasoning, the lower court denied immunity in these cases even though this Court's decision would require that immunity be granted. To explain how the D.C. Court of Appeals could have reached such a result, and why that result raises important questions meriting this Court's review, it is necessary first to trace the history of these cases beginning with the *Johnson* decision.

A. The *Johnson* Decision.

In *Johnson*, this Court granted certiorari to determine the meaning of a workers' compensation statute whose provisions were typical of those that have been adopted by every State in this country. The particular statute there at issue was that of the District of Columbia—the District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) ("the 1928 Act"). That statute, in turn, simply made the provisions of the 1927 Longshoremen's and Harbor Workers' Act, 33 U.S.C. §§ 901 *et seq.* (1982) ("the Long-

shore Act"), applicable to employers and employees in the District of Columbia. As a consequence, although *Johnson* concerned the proper construction of the local D.C. statute (the 1928 Act), in order to construe that Act the Court was required to determine the meaning of the national Longshore Act. *See Johnson*, 467 U.S. at 928 & n.4.

The particular language at issue in *Johnson* was that of §§ 4 and 5 of the Longshore Act. Section 4 of the Act required every "employer" to secure worker-compensation coverage for all its employees; it further required that, where the employer was only a subcontractor, the contractor must itself secure the coverage "unless the subcontractor" has done so. Section 5, in turn, provided that the "employer" coverage responsibility under § 4 would be "exclusive and in place of all other liability" of employers to injured employees. The question raised by these provisions was: when, if ever, could a contractor meeting its coverage responsibilities under § 4 qualify for the immunity from further liability provided by § 5?

This Court noted that lower courts construing the Longshore Act and statutes patterned on that Act (such as the 1928 Act) had split on this question. Some had held that because § 5 gave immunity only to "employers," contractors could *never* qualify for that immunity, even where they had actually purchased the § 4 compensation coverage for injured employees. But "[t]he more widely held view," this Court noted, was that at least in some circumstances contractors *could* qualify for the § 5 "employer" immunity. Significantly, as the Court also noted, among the courts adhering to this majority view were the lower court in *Johnson* itself (the D.C. Circuit) and the D.C. Court of Appeals in a previous case. 467 U.S. at 933-34, *citing Johnson v. Bechtel Assocs. Professional Corp.*, 717 F.2d 574, 581 (D.C. Cir. 1983), *rev'd*, 467 U.S. 925 (1984); *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670, 674 (D.C. 1979). For two important reasons, this Court agreed with this majority view and found it "clear" that "employer"

immunity in § 5 "must have" been intended for contractors meeting their coverage responsibilities under § 4. 467 U.S. at 936.

First, when the Court read the compensation statute as a whole, it found numerous examples of "employer" responsibilities which *had* to be read to include contractors in order for the Act "to make any sense." *Id.* at 934-36 & n.10. For example, the actual payment of compensation benefits to injured workers was required to be made only by "employers" (under §§ 7, 8, 9), but, obviously, where a contractor secured those benefits, the contractor would be required and expected to make those payments. *Id.* Likewise, the enforcement provisions of the Act imposed criminal penalties for "employers" failing to secure compensation coverage, but if contractors were not intended to be subject to those penalties, the Act would have "no apparent mechanism" for ensuring that contractors meet their § 4 coverage responsibilities. *Id.* Accordingly, the only sensible reading of § 5 and the statute as a whole was that "employer" immunity was available to contractors meeting their coverage duties. *Id.*

Second, the Court found this reading "particularly" compelling because it was "consistent with the *quid pro quo* underlying workers' compensation statutes." *Id.* at 936. As the Court explained, the *quid pro quo* in "[t]hese statutes" reflects a "legislated compromise" between injured workers and those with responsibilities for ensuring compensation benefits for those workers: as a "reward" for guaranteeing compensation for the workers—regardless of who may have been at fault—the contractor/employer receives "immunity from . . . tort suits" by those workers. *Id.* at 931. "[I]t is obvious," the Court said, that a contractor meeting its responsibility to guarantee that compensation should receive the *quid pro quo* of immunity. *Id.* at 934 (quoting 2A A. Larson, *The Law of Workmen's Compensation* § 72.31(a), at 14-112 (1982)).

The only remaining issue for the Court to decide was: what must a contractor do to meet its § 4 coverage responsibilities and thereby be eligible for § 5 immunity? The D.C. Circuit in *Johnson* and the D.C. Court of Appeals in *DiNicola* had held that contractor immunity is available *only* where the immediate employer defaults on its coverage responsibility and the contractor thereafter secures the coverage. But as this Court held, while the compensation statute could have been written that way—and in some states *has* been written that way [2]—that is not what the language adopted in the D.C. statute said.

Instead, that language provides immunity *unless* the employer "fails to secure payment of compensation as required by this Act." Hence, the Court observed, "[i]mmunity is not cast as a reward for employers that secure compensation; rather, loss of immunity is levied as a penalty on those that neglect to meet their statutory obligations." 467 U.S. at 937. Accordingly, the Court concluded, the "plain language" of the statute gives immunity to contractors "unless the contractor has neglected to secure workers' compensation coverage after the subcontractor failed to do so." *Id.* at 938.

Moreover, the Court determined that this construction is not only "faithful to the plain language," but it also "furthers the policy underlying" the statute—"which is to ensure that workers are not deprived workers' compensation coverage." *Id.* If contractor immunity were not available until *after* a subcontractor had clearly defaulted in obtaining coverage and the contractor *then* acquired coverage, the result "inevitably" would produce "gaps" in the necessary coverage. In addition, such a rule would require "a difficult set of factual inquiries" that the legislature could not have intended. *Id.* at 939. The Court therefore held that under both the plain words of the statute and its underlying policies, "[s]o long as

---

[2] The Court noted that the statutes in Nebraska and Indiana so provide. 467 U.S. at 937 n.11.

general contractors have not defaulted on this statutory obligation to secure back-up compensation for subcontractor employees, they qualify for . . . immunity." *Id.* at 940.

B. The 1984 Amendments to the Longshore Act.

In September 1984, Congress amended the Longshore Act's statutory language which this Court had construed in *Johnson*. The amendment was intended to deny immunity to contractors *unless* they actually secure coverage *and* the subcontractors fail to secure it. H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984). As a result, the pertinent language of §§ 4 and 5 in the national Longshore Act now reads as follows: "[O]nly if [a] subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation." 33 U.S.C. § 904(a) (Supp. IV 1986). "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section [4]." *Id.* § 905(a).

C. The Inapplicability of the 1984 Amendments to the District of Columbia.

In the wake of the 1984 Longshore Act amendments, the District of Columbia Courts (both the D.C. Circuit and the D.C. Court of Appeals) were required to decide whether those amendments apply to the District of Columbia, *i.e.*, whether the Congress had amended *both* the national 1927 Longshore Act *and* the 1928 D.C. Workmen's Compensation Act. Both the D.C. Court of Appeals and the D.C. Circuit held those amendments *inapplicable* to the District of Columbia because the local D.C. legislature (the D.C. Council) had previously repealed the 1928 Act and had replaced it with a new workers' compensation statute for the District—the District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) ("the 1979 Act"). *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C.

1985), *cert. denied*, 475 U.S. 1066 (1986); *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). This 1979 Act "divorced the local workers' compensation system entirely from the Longshore Act of 1927" and, accordingly, in the absence of any indication in the 1984 Amendments that Congress intended to overturn the 1979 Act and reinstate the 1928 Act, those amendments do not apply to the District. *O'Connell*, 495 A.2d at 1141, 1143; *Keener*, 800 F.2d at 1178-79. As a result, in cases still governed by the unamended language of the 1928 Act (as definitively construed in *Johnson*), contractors remain entitled to immunity unless Congress or the D.C. Council amends the pertinent language of the local statute.[3]

D. The Present Cases.

In the 1979 Act the D.C. Council re-enacted verbatim the pertinent provisions of §§ 4 and 5 of the Longshore Act which this Court construed in *Johnson*. And, because neither the Council nor the Congress has taken action to amend those sections in the local law (as Congress did in the national Longshore Act), the petitioner-contractors in these cases contended below that their immunity rights are controlled by *Johnson*'s construction of the statutory language in the governing local law. But the D.C. Court of Appeals has held otherwise.

Indeed, in two decisions handed down the same day (July 18, 1988), the D.C. Court of Appeals declared not only that *Johnson* was wrong and therefore need not be followed, but more importantly, that court also made three fundamental determinations concerning its authority vis-a-vis this Court: (1) that the D.C. Court of Appeals is the "ultimate arbiter" of local D.C. laws and

---

[3] Even though the repeal of the 1928 Act became effective in 1982, claims arising before that date (including those at issue in *Johnson* itself) remain viable under the terms of the repealed 1928 Act by virtue of the District's saving statute. *See O'Connell*, 495 A.2d at 1141-42; *Keener*, 800 F.2d at 1179.

therefore any contrary construction of such local laws by this Court need not be followed; (2) that where the local legislature (whether the Congress or the D.C. Council) adopts verbatim a federal statute, this Court's definitive interpretation of that federal statute has "no application" to construction of the local statute; and (3) that laws applicable only to the District of Columbia—at least those adopted by the D.C. Council—are not reviewable by this Court unless they present a constitutional issue. The two D.C. Court of Appeals decisions at issue are *Meiggs v. Associated Builders, Inc.* (App. 1a-17a) and *Estep v. Construction Gen., Inc.* (App. 42a-70a). Although only *Meiggs* is before this Court in the present petition, that decision can be properly understood only when it is considered in the context of its companion case, *Estep*. We therefore describe both decisions here.

1. The *Estep* Decision.

The *Estep* case is on all-fours with *Johnson*: it concerned a D.C. contractor who did not default on its coverage responsibility under the 1928 Act. Accordingly, by virtue of *Johnson*'s construction of the immunity provision of the 1928 Act, on April 3, 1985, the Superior Court in the District of Columbia dismissed the employee's tort suit against the contractor.

On appeal, however, the D.C. Court of Appeals lingered for four years—twice entertaining oral argument—on the question whether that court should follow *Johnson* or, on the other hand, should follow its own previous 1928 Act decision (*DiNicola*) which this Court declined to follow in *Johnson*. In addition, the D.C. Court of Appeals *sua sponte* called for briefing from the parties and from the District of Columbia itself on the questions: (1) whether *Johnson* may be reconciled with *DiNicola*; (2) whether the D.C. Court of Appeals' jurisdiction over "local issues" is "equivalent for all purposes to that of the highest court of a state;" and (3) whether Congress' adoption of the 1928 Act represented an exercise of "national or federal" power or, alternatively, was an exercise of Congress' power under Article I, § 8,

Clause 17 of the Constitution to make laws for the District of Columbia. Order of March 11, 1986 (reprinted at App. 71a-73a).

Ultimately, a divided D.C. Court of Appeals determined that this Court's *Johnson* decision had "squarely rejected *DiNicola*'s understanding of . . . the Longshore Act, as incorporated in the 1928 Act." App. 48a. It furthermore determined that "because the 1928 Act merely incorporates the provisions of the Longshore Act, . . . Congress intended the construction of the local law and the federal law to be identical." App. 53a. Nevertheless, the court continued, it had the authority "to give the local law a gloss different from [this Court's] interpretation [of] . . . the federal law;" moreover, the court reasoned, even though *Johnson* had simultaneously construed both the federal Longshore Act and the local 1928 Act, there may be "circumstances in which we may nonetheless decline to follow a Supreme Court decision construing a local law adopted by the Congress," and, *a fortiori*, may do so in the case of a "local law adopted by the Council of the District of Columbia . . . . *See Meiggs v. Associated Builders, et al.*, 545 A.2d 631 (D.C. 1988)." App. 51a-52a.

Nevertheless, inasmuch as a majority of the *Estep* panel found "no reason" to treat the Longshore Act and the 1928 Act differently for purposes of the contractor immunity question at issue, it elected to follow *Johnson* and therefore affirmed the Superior Court's decision. App. 56a. In dissent, however, Judge Mack did find reason not to follow *Johnson*. Her *Estep* dissent is important here because in *Meiggs*—the cases now before this Court—Judge Mack's view became the majority and in those cases she wrote the opinion for the court refusing to follow *Johnson*.

In her *Estep* dissent, Judge Mack first asserted that the District of Columbia Court of Appeals is the "final expositor of District of Columbia law." App. 57a. She acknowledged, however, that this Court has often held

to the contrary. App. 58a. *See, e.g., Whalen v. United States*, 445 U.S. 684, 687 (1980) (acts "applying only within the District, like other federal laws, certainly come within this Court's Art. III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute"). Nevertheless, Judge Mack stated that she felt "compelled" to suggest "that it is not at all clear" that this Court is right in claiming jurisdiction over statutes affecting only the District of Columbia. App. 59a. She therefore found it "remarkable" that the *Estep* majority would not simply follow its own previous construction of the 1928 Act in *DiNicola*, rather than this Court's "conflicting" interpretation of that Act in *Johnson*. App. 57a.

Judge Mack, in any case, disagreed with the majority that this Court definitively interpreted the local 1928 Act in *Johnson*, App. 66a, even though she acknowledged that "it was the application of [the local Act] that was actually at issue in *Johnson*." *Id.* In her view, this Court should always defer to a D.C. Court of Appeals' construction of local law, even where—as in *Johnson*—"a question of local law cannot be separated from a question of general law." App. 63a. She believed this Court simply overlooked this principle in *Johnson*: "the *Johnson* Court did not afford its normal deference to this court because *it did not realize that deference was appropriate*." App. 66a (emphasis supplied).

Accordingly, Judge Mack concluded that *Johnson* has not "interpreted the statutory provisions at issue"—even though they were the very provisions at issue in *Johnson*—and that the D.C. Court of Appeals is therefore not "constrained by conflicting Supreme Court precedent as a result of *Johnson*." App. 67a. She furthermore would not have followed *Johnson* because, in her view, that decision "did not comport with the philosophy underlying workers' compensation schemes," App. 67a-68a,—

the opposite conclusion from that reached by Justice Marshall for this Court. *Compare Johnson*, 467 U.S. at 936 ("granting tort immunity to contractors that comply with § 4(a) is consistent with the *quid pro quo* underlying workers' compensation statutes") *with Estep*, at App. 68a ("general contractor immunity destroys the *quid pro quo* of workers' compensation") (Mack, J., dissenting). For all these reasons, Judge Mack would not have followed this Court's decision.

2. The *Meiggs* Decision.

While the *Estep* majority declared that it did not have to reach the question whether it could "decline to follow a Supreme Court decision construing local law," App. 51a, in *Meiggs*—the cases now before this Court—that question was reached and Judge Mack's view prevailed.

In *Meiggs*—as was true in *Johnson* and *Estep*—the court again faced the circumstances of contractors that had not defaulted under their § 4 duty to provide compensation coverage and therefore asserted § 5 immunity against tort suits brought by employees who had already received their workers-compensation benefits. And, again as was true in *Johnson* and *Estep*, the local D.C. law incorporated verbatim the pertinent provisions of §§ 4 and 5 construed by this Court in *Johnson*. The only difference between *Johnson* and *Meiggs* was that in *Johnson* §§ 4 and 5 were incorporated in the local 1928 Act while in *Meiggs* they were incorporated in the local 1979 Act (which had repealed the 1928 Act).

The trial courts in the *Meiggs* cases divided over whether to follow *Johnson* or *DiNicola*. In *Meiggs* itself (*Meiggs v. Associated Builders*) as well as in *Frazier v. Faith Constr. Co.*, Judges Holmes and Wertheim, respectively, followed *Johnson*. *See* App. 4a. In *Hobbs v. KBR Corp.*, however, Judge Weisberg followed *DiNicola*. *See id.*[4]

---

[4] A comparable division has occurred among the lower federal courts in the District of Columbia. Thus, in *Ford v. United States*,

On appeal, the cases were consolidated and decided the same day as *Estep* in an opinion by Judge Mack (joined by Chief Judge Rogers and Judge Steadman). In that opinion—which rejected *Johnson* and followed *DiNicola*—Judge Mack relied largely on the same rationale that was advanced in her *Estep* dissent.

Thus, Judge Mack began the *Meiggs* decision, as she did her *Estep* dissent, with the proposition that on questions of local law, "this court is undeniably the final arbiter." App. 6a. As regards local statutes, she held, "interpretations by this court will be binding;" however, "interpretations by another court"—including this Court in *Johnson*—"carry no precedential value." App. 11a. She added that, in any event, "*Johnson* . . . has very little, if any, persuasive value" because Congress subsequently amended the provisions of the national Longshore Act construed in that case. App. 6a.

Considering itself thus "[f]reed of the encumbrances flowing from contradictory judicial interpretations, and strained reliances on *Johnson*," the lower court considered anew the precise statutory language this Court had already construed in *Johnson*. App. 6a-7a (footnote omitted). After analyzing both the provisions of §§ 4 and 5 of the Longshore Act (as incorporated in the local act) as well as the remaining provisions of the local act (as also incorporated from the Longshore Act), the court came to the opposite conclusion as did this Court: that "the plain language and overall structure of the [local] Act," as well as the *quid pro quo* underlying the Act, demonstrate that the *only* circumstances in which contractor immunity is available is "when the actual em-

---

No. 84-3082 (D.D.C. Mar. 22, 1985) and *Stokes v. George Hyman Constr. Co.*, No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 84-5147 (D.C. Cir. Jan. 24, 1985), Judges Pratt and Parker, respectively, followed *Johnson*. On the other hand, in *Allen v. United States*, 625 F. Supp. 841 (D.D.C. 1986), Judge Richey followed *DiNicola*. Resolution of this conflict among the federal district courts is now pending in the D.C. Circuit in the *Stokes* case, which was stayed awaiting the outcome in *Meiggs*.

ployer—the subcontractor—defaults on its statutory obligation, and the general contractor steps in to secure payment." App. 9a-10a. Judge Mack therefore reinstated the *DiNicola* holding and did so—as *Johnson* made clear—without addressing the fact that that holding cannot be squared with *the language* of § 5 itself.[5] As a result, she denied immunity in the present cases.

3. Rehearing Denials in *Estep* and *Meiggs*.

Given the conflicting, simultaneous decisions in *Estep* and *Meiggs*—one case denying immunity to contractors, the other granting it, even though both cases construed the *identical* language of the Longshore Act as incorporated in successive local acts—rehearing *en banc* petitions were filed in both cases. In a single consolidated order (issued Jan. 18, 1989), the court denied both petitions, leaving the conflict unresolved. App. 36a-39a. The court denied the petition in *Meiggs* by a vote of 6-2. It denied the petition in *Estep* 4-4. The court thereafter denied 6-2 a motion for reconsideration in *Estep* which sought a new vote once a ninth judge is added to the court. App. 40a. Chief Judge Rogers and Judge Mack (two of the judges forming the majority in *Meiggs*) voted to grant this motion. They had previously voted to deny *en banc* hearing in *Meiggs* but to grant it in *Estep*.

REASONS FOR GRANTING THE WRIT

This is an extraordinary case. It presents the spectre of a lower court declaring that *this Court* erred in failing to follow *that court's* construction of statutory language, declaring further that that lower court will not

---

[5] In addition to her disagreement with this Court concerning the meaning of the statutory language, Judge Mack premised her decision on certain policy arguments and on the principle that the legislature knew about and intended to adopt the *DiNicola* decision when it passed the statute. As explained below, the cited policy arguments were not accepted by this Court in *Johnson* and the cited principle of statutory construction is wholly inapplicable to the present cases.

adhere to this Court's contrary construction of the pertinent language, and declaring, moreover, that this Court has no jurisdiction to prevent such a defiance of its own previous decision. Furthermore, in its determination to establish itself as the "ultimate arbiter" of the statutory question at issue and to override this Court's view of that issue, the lower court has effectively amended a statute which the Congress and the D.C. Council have chosen not to amend. Finally, in its insistence that its authority is equal to those of a state supreme court, the D.C. Court of Appeals has in fact claimed greater authority than that exercised by state supreme courts.

Such action raises serious, fundamental questions about the relationship between this Court and the D.C. Court of Appeals, about that court's role as the highest court of the District of Columbia, about the appropriate method for that court to interpret a D.C. statute patterned on a federal statute, and about the division of responsibility between that court and the Congress and the D.C. Council. As to each of these important questions, as further explained below, the judgment of the D.C. Court of Appeals conflicts not only with prior decisions of this Court, but with the unanimous decisions of state courts that have addressed similar questions. For all these reasons, the petition for certiorari should be granted.

1. The Court Should Grant Certiorari to Clarify Its Jurisdiction Over Decisions of the D.C. Court of Appeals.

Through Judge Mack's opinion, the D.C. Court of Appeals has concluded that this Court lacks the authority to review that court's interpretation of the D.C. Workers' Compensation Act of 1979: "On a question of purely local law, this court [the D.C. Court of Appeals] is undeniably the *final* arbiter." App. 6a (emphasis supplied). Judge Mack further held that "interpretations by [the D.C. Court of Appeals] will be binding"; however, "interpretations by another court [including this Court in *Johnson*] carry no precedential value." App. 11a. In her

Estep dissent, she elaborated on this view of the relationship between this Court and the D.C. Court of Appeals: "I feel compelled . . . not to shirk from suggesting, however delicately, that it is not at all clear that acts of Congress affecting only the District are 'laws of the United States' within the meaning of Article III." App. 59a.

Judge Mack's conclusion directly contradicts the principles enunciated by this Court in *Whalen v. United States*, 445 U.S. 683 (1980). There, this Court held that acts affecting only the District constitute *federal* law, not "purely local law" as the Court of Appeals assumed. *Id.* at 687. More importantly, the Court held that such acts, "like other *federal* laws, certainly come within this Court's Art. III jurisdiction, and thus *we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts* in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute." [6]

It is true that in *Whalen* and *Pernell* this Court was addressing *Acts of Congress* made applicable only to the District, rather than (as here) a statute enacted by the *D.C. Council* and made applicable only to the District. However, Congress' determination to permit the D.C. Council to make laws in the first instance for the District—subject to Congress' review and approval [7]—should not serve to oust this Court of jurisdiction to review such laws. Those laws remain, ultimately, Acts of Congress, inasmuch as they are passed pursuant to Congress' nondelegable, constitutional authority to make laws for the District of Columbia. U.S. Const., art. I, § 8, cl. 17.

---

[6] *Id.* at 687-88 (emphasis supplied); *accord Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974).

[7] *See* District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, §§ 602(c)(1), 602(c)(2), 87 Stat. 774, 814 (current version at D.C. Code Ann. §§ 1-233(c)(1), 1-233(c)(2) (1987)).

Accordingly, the principle announced in *Whalen* and *Pernell* should govern all Acts made applicable only to the District, whether passed initially by Congress or approved by Congress after action by the D.C. Council.

In reaching her contrary conclusions, Judge Mack asserted that there is doubt whether this Court can review even Acts of Congress made applicable to the District, unless the Act presents a constitutional issue. App. 63a-64a. To support this view, she further asserted that "the Supreme Court, understandably in decisions over the years, has not been entirely consistent in its jurisdictional treatment of congressional acts affecting only the District." App. 60a-61a (footnote omitted). Judge Mack's reference is to the cases construing this Court's authority over the D.C. Court of Appeals pursuant to 28 U.S.C. § 1257.

The first such case was *Palmore v. United States*, 411 U.S. 389 (1973), which presented an *appeal* under 28 U.S.C. § 1257(2) (1982) and concerned a state statute that was sustained over a challenge that it was "repugnant to the Constitution, treaties, or laws of the United States." [8] The Court concluded that "Congress [did not] intend[] to treat the District of Columbia Code as a state statute for the purposes of § 1257(2)" and accordingly reviewed petitioner's claim pursuant to its certiorari authority under § 1257(3). 411 U.S. at 396. Since the *Palmore* Court determined that the constitutional issues raised by the petitioner provided a basis for jurisdiction under § 1257(3), the Court did not decide whether a claim made under the District of Columbia statute could *in itself* be a basis for jurisdiction.

Subsequently, in *Key v. Doyle*, 434 U.S. 59 (1977), review was sought of a D.C. Court of Appeals' decision pursuant to § 1257(1), which at that time provided for

---

[8] As this Court is aware, under the terms of the revised statute, review of D.C. Court of Appeals' decisions is now available only by writ of certiorari. 28 U.S.C.A. § 1257 (Supp. 3 Oct. 1988) (effective date Sept. 27, 1988).

review "by *appeal*, where is drawn into question the validity of a treaty or statute *of the United States* and the decision is against its validity." (Emphasis supplied.) The statute at issue, which was enacted by Congress rather than by the D.C. Council, voided certain religious bequests and devises. In concluding that "no right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application," *id.* at 68, the Court stated: "From such judgments . . . there is . . . review by writ of certiorari according to the terms of § 1257(3)." *Id.* Again, however, the Court did not address whether the "terms of § 1257(3)" permitted review of a D.C. statute in the absence of a constitutional question.[9]

Taken together, *Palmore* and *Key* do not definitively resolve the question whether this Court has jurisdiction under § 1257 to review D.C. Court of Appeals' interpretations of District of Columbia statutes where no constitutional issue is presented. In a dissenting opinion in *Key*, Justice White (joined by Chief Justice Burger and Justices Blackmun and Powell) addressed this question as follows:

> The majority's construction of "statute of the United States" in § 1257(1) is . . . disturbing because it may ultimately undermine this Court's certiorari jurisdiction over cases from the D.C. Court of Appeals. The majority does not explain its rationale for assuming certiorari jurisdiction in this case. Presumably it views this case as one in which a "right" has been "specially set up or claimed under the Constitution" within the meaning of § 1257(3). However, in cases involving the construction of federal laws dealing with the District of Columbia, that approach would not be available. While there is pro-

---

[9] The Court limited its conclusion that the laws of the District of Columbia are not "statutes of the United States" to the terms of § 1257(1), *see* 434 U.S. at 67 n.12, cautioning that "each jurisdictional provision is to be interpreted in the light of its own antecedents, purposes and context." *Id.* at 64 n.6.

> vision in § 1257(3) for cases in which the right is derived from a "statute" of the United States, invocation of that provision would require that the Court interpret identical words in the jurisdictional statute in two different ways, a practice the majority evidently disapproves. See *ante*, at 62-63 n. 5. Thus, this Court may ultimately be left with no jurisdiction whatsoever over cases in which the D.C. Court of Appeals construes a federal statute dealing with the District of Columbia.

434 U.S. at 74-75 & n.6 (White, J., dissenting).

It was apparently Justice White's observations in *Key* that caused Judge Mack to conclude that this Court lacks jurisdiction to review her decision and that authorized her to flout *Johnson*. Yet, as Justice White also observed, "[i]t is highly improbable that Congress would have given such free rein in interpreting federal laws to a court which it regarded as 'the highest court of a State' or that it would have so restricted this Court's appellate jurisdiction without expressly saying so." *Id.* at 75 n.6.

In light of the ambiguity left by *Whalen*, *Key*, and *Palmore*, this Court should now clarify its jurisdiction over the D.C. Court of Appeals. For several reasons, this case presents an especially appropriate vehicle for doing so. First, the jurisdictional issue has already been addressed by the lower court itself. Second, the lower court has used its position on the jurisdictional issue as a justification for refusing to follow precedent from this Court (*Johnson*) that is squarely on point; denial of certiorari would therefore leave standing a decision authorizing the D.C. Court of Appeals to ignore any and all precedents from this Court interpreting D.C. laws.[10] And third, this case concerns a law passed not by the Congress, but by the D.C. Council—an additional factor whose significance this Court has never addressed.

---

[10] Inasmuch as *en banc* hearing was denied in *Meiggs*, that decision now constitutes binding precedent for all future D.C. Court of Appeals' decisions. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

Accordingly, in order to give guidance both to the D.C. Court of Appeals and to parties considering petitioning this Court for review of that court's decisions, the writ should be granted.

2. The Court Should Grant Certiorari to Preserve the Integrity of Its Decisions and to Clarify Its "Deference" Policy with Regard to D.C. Court of Appeals' Decisions.

In concluding that *its* interpretation of the language at issue is the "ultimate" one, the D.C. Court of Appeals relied on the proposition that this Court must defer to that court's construction of local laws. Indeed, Judge Mack's *Estep* and *Meiggs* opinions together make clear her view that *this Court erred* in failing to defer to *DiNicola* in *Johnson* and that deference is required as to all D.C.-law constructions in the absence of an intertwined constitutional issue. On that basis, she refused to follow *Johnson*. Her analysis and decisions represent a serious failure to accord proper respect to this Court and a fundamental misunderstanding of this Court's deference policy.

This Court provided its most recent statement of its policy of deferring to the interpretations of the D.C. Court of Appeals in *Whalen*: "[O]n matters of *exclusively* local concern," this Court will defer to the decisions of courts of the District of Columbia. 445 U.S. at 687 (emphasis supplied). The overriding fallacy in Judge Mack's analysis is her supposition that the issue presented in *Johnson*, *Estep*, and *Meiggs* was "exclusively local." But it is not, as this Court made clear over fifty years ago.

In *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), this Court was faced with the same proposition asserted by the D.C. Court of Appeals here—that the construction of a provision of the national Longshore Act as incorporated into District law did not present a federal issue, and that, as a result the Court should not review it.

The *Del Vecchio* Court squarely rejected that proposition, stating that:

> [t]he objection might be valid if the statute were confined in its operations to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application.

296 U.S. at 285. The *Del Vecchio* decision makes clear that this Court—not the D.C. Court of Appeals—is the "ultimate arbiter" of the statutory question presented in *Johnson* and that that question is *not* an exclusively local one. Accordingly, this Court did *not* err in *Johnson* in declining to follow the *DiNicola* decision.[11]

Furthermore, even if this Court *had* erred in *Johnson* in its interpretation of the local D.C. law and in its refusal to accord deference to the contrary interpretation of that law by the D.C. Court of Appeals, the latter court has no authority to defy this Court's decision. Once *this Court* definitively interpreted the language at issue and chose not to defer, that decision was the "ultimate" one.

Accordingly, the Court should grant certiorari to maintain its authority over the D.C. Court of Appeals and to clarify its deference policy with regard to that court's decisions. For the Court to do otherwise would leave intact the D.C. Court of Appeals' "reversal" of this Court and would invite similar reversals with regard to any D.C. law being interpreted by the lower court.

---

[11] Moreover, even as to matters of "exclusively local concern," this Court retains power to reject a D.C. Court of Appeals' decision constituting "egregious error." *Pernell*, 416 U.S. at 368-69. It is hard to see how the present decision can fail to qualify for that label: it has declared statutory language definitively construed by this Court to mean the opposite of what this Court said it plainly means.

3. The Court Should Grant Certiorari to Define the D.C. Court of Appeals' Authority in Interpreting D.C. Statutes Patterned on a Federal Statute.

A key underpinning of the lower court's judgment was its claim to possess authority equal in all respects to that of a state supreme court. *See* App. 6a, 61a-64a. While this Court's decisions demonstrate that this claim is unfounded,[12] in effect the judgment below constitutes an assertion of *greater* power than that exercised by state supreme courts. Indeed, even if the D.C. Court of Appeals were in some circumstances permitted to depart from this Court's definitive construction of a federal statute whose language has been adopted for the District of Columbia, the D.C. Court of Appeals' approach on this question conflicts with that of every state supreme Court which has faced it.

The universally-followed rule in other state courts is that federal court constructions of a federal statute are persuasive authority and are entitled to great weight in the interpretation of a state statute patterned on the federal statute.[13] These state courts have found it ap-

---

[12] *See Whalen*, 445 U.S. at 687-88 (decisions of D.C. Court of Appeals concerning Acts of Congress affecting only the District are not barred from Supreme Court review "in the same jurisdictional sense" as is a "state court's interpretation of a state statute"); *Pernell*, 416 U.S. at 368 n.4 ("We do not intend to imply that the District of Columbia Superior Court and Court of Appeals must be treated as state courts for all purposes.").

[13] *See, e.g., SCA Constr. Supply v. Aetna Casualty & Surety Co.*, 754 P.2d 1339, 1341 (Ariz. 1988) (when state legislature adopts or models statute after that of federal government, federal judicial interpretations of federal statute "will be persuasive in interpreting the Arizona statutory counterpart"); *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App 3d 1394, 1399, 245 Cal. Rptr. 606, 609 (1988) (because language and objectives of state statute parallel language and objective of federal statute, state court will refer to federal decisions where appropriate); *People v. Wahl*, 716 P.2d 123, 128 (Colo. 1986) (state statute closely-patterned after federal act, so federal authorities explaining federal act should be accorded "great weight" in interpreting state statute); *Oppen-*

propriate to depart from the established meaning of the adopted federal statute only where there is a clear, af-

---

heimer & Co. v. Young, 456 So. 2d 1175, 1178 (Fla. 1984) (state court will normally give same construction to state statute as federal courts give to corrollary federal statute), *vacated on other grounds*, 470 U.S. 1078 (1985); *State v. Thompson*, 745 P.2d 1087, 1093 (Idaho Ct. App. 1987) (state court relied on federal construction of federal statute in interpreting analogous state statute), *aff'd in part and rev'd in part on other grounds*, 760 P.2d 1162 (Idaho 1988); *Wapella Educ. Ass'n, IEA-NWA v. Illinois Educ. Labor Relations Bd.*, 531 N.E.2d 1371, 1376 (Ill. App. Ct. 1988) (decisions of federal courts interpreting similar provisions under federal act are "persuasive authority" for state court construing state statute); *Adam v. Mount Pleasant Bank & Trust Co.*, 340 N.W.2d 251, 252 (Iowa 1983) (because state statute "based on" federal act, federal decisions interpreting federal act entitled to "great weight" in interpreting state statute); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1158 (La. 1986) (because state statute is counterpart to federal act, U.S. Supreme Court's interpretation of federal act should be "persuasive influence" on interpretation of state statute); *Gardner v. State*, 549 A.2d 1171, 1176 (Md. Ct. Spec. App. 1988) (because provisions of state and federal law are so similar, state court should be guided by case law interpretation of federal statute when examining state analog); *Faulk v. State's Attorney for Harford County*, 474 A.2d 880, 887 (Md. 1984) (where purpose and language of federal statute are substantially the same as later state statute, interpretations of federal statute are "ordinarily persuasive"); *Howard v. Town of Burlington*, 506 N.E.2d 102, 105 (Mass. 1987) (in construing state statute, state court is ordinarily guided by construction given parallel federal statute by federal courts); *Airport Inn, Inc. v. Nebraska Equal Opportunity Comm'n*, 353 N.W.2d 727, 731 (Neb. 1984) (because state statute is patterned after portion of federal act, it is appropriate to look to federal court decisions construing similar and parent federal legislation); *Benavidez v. Benavidez*, 660 P.2d 1017, 1021 (N.M. 1983) (because state rule of procedure is worded same as federal rule, it is appropriate to look at federal law construing federal rule when interpreting state rule); *Dreyfus Special Income Fund, Inc. v. New York State Tax Comm'n*, 514 N.Y.S.2d 130, 134 (N.Y. App. Div. 1987) (terms used in state tax law are to be accorded same meaning as those used in federal tax law), *aff'd*, 528 N.E.2d 509 (1988); *Stone v. Lynch*, 315 S.E.2d 350, 352 (N.C. Ct. App. 1984) (when state and federal statutes contain identical language, federal interpretations are "instructive"), *aff'd*, 325 S.E.2d 230 (N.C. 1985); *State v. Gallant*, 764 P.2d

firmative indication that the state legislature intended a different meaning.[14]

The D.C. Court of Appeals completely departed from this rule. Although that court was construing language taken from the Longshore Act which this Court has definitively construed in *Johnson*, the court declared *Johnson* to have "very little, if any, persuasive value" and determined the intent of that language as if it were

---

920, 922 (Or. 1988) ("[i]nterpretations of federal statutes often are persuasive in the interpretation of identical provisions of state law"); *Marchant v. Hamilton*, 309 S.E.2d 781, 783 (S.C. Ct. App. 1983) (interpretations of federal statute given "great weight" in construing state statute having substantially identical wording); *State v. Kirk*, 699 S.W.2d 814, 818-19 (Tenn. Crim. App. 1985) (state rule of criminal procedure which paralleled federal rule was to be interpreted in line with federal construction), *cert. denied*, 475 U.S. 1023 (1986); *In re Local 1201, AFSCME, Rutland Dep't of Pub. Works*, 469 A.2d 1176, 1179 (Vt. 1983) (state court will look for guidance to federal decisions interpreting federal act which parallels state statute); *Virginia Dep't of Labor and Indus. v. Westmoreland Coal Co.*, 353 S.E.2d 758, 763 (Va. 1987) (state court looks to prior interpretations of federal statute when state adopts language substantially similar to federal language); *Gray v. Marshall County Bd. of Educ.*, 367 S.E.2d 751, 755 (W. Va. 1988) (court applied federal decisional law construing federal statute when interpreting identical state statutory language); *Apodaca v. State*, 627 P.2d 1023, 1027 (Wyo. 1981) (since state statute was derived from federal act, court views federal case law on the latter as "convincing authority" when construing the former); *see also State v. Earls*, 752 P.2d 402, 404 (Wash. Ct. App. 1988) (in construing its own state statute, state court relied on U.S. Supreme Court construal of a sister state's statute which had identical language).

[14] *See, e.g., Gallant*, 764 P.2d at 922 (federal construction overridden when an intent to change meaning of state statute is signaled by an amendment); *Lynch*, 315 S.E.2d at 352-53 (construction of analogous federal statute may be disregarded where state legislature clearly intended federal practice *not* to control); *Dreyfus Special Income Fund, Inc.*, 514 N.Y.S.2d at 134 (disregard of federal construction permissible only where a different meaning is "clearly required" by state statute).

a matter of first impression. App. 6a. Judge Mack's *Meiggs* decision therefore analyzed the *same* statutory provisions and the *same* policy considerations underlying those provisions that this Court had analyzed in *Johnson* and simply came to the opposite conclusion about the "plain" meaning of those provisions. App. 10a. And, contrary to the requirement of other state courts,[15] Judge Mack could point to *no* clear, affirmative indication that the D.C. Council intended the words it adopted from the federal statute to have a meaning different from that federal statute.[16] She simply disagreed with this Court's reading of the language and so rejected it.

---

[15] The requirement followed in the state courts is also the one observed by this Court. When a statute (as here) is revised or reenacted, "no changes of law or policy are to be presumed . . . unless an intent to make such changes is *clearly expressed.*" *Fourco Glass Prods. Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1956) (emphasis supplied).

[16] Judge Mack did purport to confirm her reading of the "plain" language of the statute by relying on the presumption that the D.C. Council knew about and intended to adopt the *DiNicola* decision when it incorporated §§ 4 and 5 of the Longshore Act into the local 1979 Act. App. 13a-14a. For several reasons, this presumption cannot begin to constitute the *affirmative* indication of legislative intent required by *Fourco* and by the approach of other state courts.

First, where, as here, the language of the statute is found to be "plain," resort to extrinsic presumptions about contrary legislative intent are impermissible. "If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is a 'clearly expressed legislative intent to the contrary.'" *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 110 (1983) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Second, as Chief Justice Warren wrote for the Court in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), the presumption that re-enactment of certain statutory language indicates adoption of a prior judicial construction of that language—"particularly without the slightest *affirmative* indication" that the legislature knew about the construction—"is an unreliable indicium

Accordingly, while this Court's decisions indicate that the D.C. Court of Appeals' authority is not equal to that of a state supreme court, here that court has claimed authority greater than that exercised by state supreme courts. This Court should therefore grant certiorari to clarify the D.C. Court of Appeals' authority in the circumstances presented by this case.

4. The Court Should Grant Certiorari to Preserve the Authority of the Congress and the D.C. Council to Make Laws for the District of Columbia.

In denying immunity to the contractors in these cases, Judge Mack relied heavily on the proposition that to do otherwise would be "unfair," would be contrary to the "humane purpose" of workers' compensation statutes, and would work an abrogation of common-law rights. App. 15a-16a, 68a.[17] But these are all policy considerations for legislatures to weigh; they are not factors justifying a court departing from the plain language the legislature has written.[18] As this Court and the lower

---

at best." Such an unreliable indicium is, *a fortiori*, insufficient to contradict statutory language whose meaning is "plain."

Finally, a presumption that the D.C. Council knew about and adopted the *DiNicola* decision is in any event inappropriate. As the D.C. Court of Appeals itself has recognized, the presumption of legislative adoption applies only to "known and settled" prior judicial interpretations, *Lenaerts v. Dep't of Employment Servs.*, 545 A.2d 1234, 1238 (D.C. 1988) (citing, *inter alia, Capital Traction Co. v. Hof*, 174 U.S. 1 (1899)), and a single court of appeals' decision "does not approach the dignity of a well settled interpretation." *United States v. Raynor*, 302 U.S. 540, 551-52 (1938). The statutory provisions here at issue were introduced *before DiNicola* was decided by the D.C. Court of Appeals (and they remained substantively unchanged through enactment), and that decision (which *reversed* the lower court) resolved a matter of first impression for the local D.C. courts.

[17] Similar policy arguments were made to this Court in *Johnson*. *See* Brief for the Respondents, at 30-35, *Johnson*, 467 U.S. 925 (1984).

[18] Judge Mack also purported to rely on certain legislative history. But that history sheds no light whatever on the immunity question here at issue and, in any event, where, as here, the lan-

courts have often held, the judiciary's function—its only function—is to enforce the words the pertinent legislative body has adopted; it is not to remedy perceived legislative mistakes or to carry out judicial perceptions of wise policy.[19] The court in *Meiggs* violated this fundamental

---

guage of the statute is plain, resorts to legislative history are inappropriate. *See, e.g., Davis v. Michigan Dep't of Treasury*, 57 U.S.L.W. 4389, 4390 n.3 (Mar. 28, 1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.") (citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977)); *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (Court found "canvass[ing]" of legislative history to be "irrelevant" because " '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete' ") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Wilbur v. United States*, 284 U.S. 231, 237 (1931) (consideration of legislative history "not . . . permissible" when language and meaning of statute are clear); *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."). Moreover, as another panel of the D.C. Court of Appeals made clear in *O'Connell*, the legislative history clearly demonstrates that a prime motivating purpose of the 1979 Act was to equalize the benefits and burdens of D.C. employers with their counterparts in Maryland and Virginia. 495 A.2d at 1141 & n.13. *Meiggs* clearly undercuts that purpose by denying immunity to D.C. contractor/employers where their Maryland and Virginia counterparts would receive it. *See* Brief for the Commonwealth of Virginia and the State of Maryland as *Amici Curiae* in Support of the Petitioner, at 4-8, *Johnson*, 467 U.S. 925 (1984).

[19] *See, e.g., Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 378 (1973) ("It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner."); *City of Greenwood v. Peacock*, 384 U.S. 808, 834 (1966) (it is for Congress, not the Supreme Court, to make changes to settled interpretation of statute); *Franklin v. First Money, Inc.*, 427 F. Supp. 66, 71 (E.D. La. 1976) ("courts may not ignore the clear wording of statutes and impose, in lieu of those statutes, measures that seem more just or efficacious"), *aff'd*, 599 F.2d 615 (5th Cir. 1979); *Herzberg v. Finch*, 321 F. Supp. 1367, 1369 (S.D.N.Y. 1971) (court

principle and, accordingly, once again claimed greater powers than those exercised by state supreme courts.

In the wake of *Johnson*, those state legislatures wishing to deny immunity in the circumstances presented here have appropriately revised their respective workers' compensation statutes. For example, on May 28, 1988 Connecticut amended section 31-291 of its workers' compensation act to deny immunity to a principal employer who procures work to be done for him by a contractor, or through him by a subcontractor, "unless such principal employer has paid compensation benefits . . . to [a]n injured employee . . . ." Similarly, in 1986 the Virgin Islands legislature amended the exclusive-remedy provision of its Workmen's Compensation Act to eliminate the statutory employer doctrine, which granted immunity not only to a worker's immediate employer but also to a secondary employer. *See Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1260 (3d Cir.) (Stapleton, J., dissenting), *cert. denied*, 108 S. Ct. 452 (1987).[20]

However, with the exception of the D.C. Court of Appeals in this case, *every* court that has faced the question has determined that *Johnson*'s construction of the pertinent language is definitive *unless* the legislature has amended that language. For example, in *Keener*, the D.C. Circuit expressly determined that because the 1984

---

does not have power to amend legislative act in order to rectify alleged congressional "oversight;" court must interpret statute that is clear and unambiguous and not legislate contrary result).

[20] Significantly, the legislative history of the Virgin Islands amendment explains that the legislature believed the amendment was needed because in granting such immunity to secondary employers its courts had been interpreting the prior exclusive remedy provision in a manner "the [l]egislature never intended." *Id.* (quoting explanation attached to Bill No. 498, 16th Legislature (1986)). Moreover, in taking this action the legislature specifically cited the circumstances of *Johnson* and Congress' 1984 Amendments. *Id.*

Amendments do not apply to the District of Columbia, *Johnson*'s construction of the unamended 1928 Act governs in the District of Columbia. 800 F.2d at 1178-79.[21] Similarly, in *Garvin v. Alumax of S.C., Inc.*, 787 F.2d 910, 916-17 (4th Cir. 1986), *cert. denied*, 479 U.S. 914 (1986), the Fourth Circuit noted that prior to the 1984 Amendments the Longshore Act and South Carolina's Workmen's Compensation Act "were completely congruent" with respect to the issue of general contractor immunity. *Id.* at 916. The court furthermore noted that "nothing done in the Congress [in its 1984 Amendments] suggests that it intended to modify immunities provided general contractors by state workmen's compensation laws, when those laws are applicable." *Id.* at 917. Therefore, the court concluded that *Johnson* continues to be the correct interpretation of general contractor immunity under South Carolina's workers' compensation law.[22]

---

[21] *Cf. Webb v. Montana Masonry Constr. Co.*, 761 P.2d 343 (Mont. 1988). There the Montana Supreme Court explained that prior to state constitutional and statutory amendments in 1972 and 1973 it had adopted the majority view extending immunity to statutory employers. *See id.* at 345-47. However, the court noted that after the amendments the grant of immunity had been "excised from Montana law, root and branch, forever." *Id.* at 347. Accordingly, in denying immunity to a general contractor the court found *Johnson* to be distinguishable because "under the law in Montana . . . the immediate employer is ultimately liable and . . . there is no requirement that the contractor carry compensation insurance if its subcontractor does not." *Id.* at 349.

[22] Other courts have likewise recognized that this Court's decision in *Johnson* is still the dispositive interpretation of the language at issue there, regardless of the fact that Congress subsequently amended the language. *See, e.g., Louviere v. Marathon Oil Co.*, 755 F.2d 428, 429 (5th Cir. 1985) (per curiam) (district court correctly applied *Johnson* in holding that general contractor was immune from suit because subcontractor had secured compensation, but 1984 amendments enacted after district court's decision required reversal)

In this case, the D.C. Council, like most legislatures,[23] has not amended the D.C. law.[24] Nor has Congress taken action to amend that law. Nevertheless, the D.C. Court of Appeals has taken action *for* the D.C. Council and, through its *Meiggs* decision, has effectively amended the D.C. statute. In so doing, that court not only acted contrary to every other court facing a similar issue, but more importantly, the court contradicted fundamental principles established by this Court concerning the role of the courts vis-a-vis the legislature. This Court should therefore grant certiorari to limit the D.C. Court of Appeals' role in such circumstances and preserve the authority of the Congress and the D.C. Council to make laws for the District of Columbia.

---

[23] Indeed, in his authoritative treatise on workers' compensation law, Professor Larson emphasizes that the *Johnson* decision "strongly confirmed" the "marked trend" toward granting immunity to general contractors when their subcontractors are also insured because "the relevant portions of the Longshoremen's Act are *sufficiently similar to* corresponding portions of *most state acts* to permit this case to be used as persuasive authority." 2A A. Larson, *The Law of Workmen's Compensation*, § 72.31(b), at 14-177 (1988) (emphasis supplied). Professor Larson commented that Justice Marshall, by explaining that "the term 'employer' in compensation law had come to include the statutory employer," interpreted the relevant language in the way that "best carries out the compromise inherent in a compensation act." *Id.* at 14-178. In addition, Professor Larson noted that even the dissenting opinion in *Johnson*, which analogized general contractors to "back-up quarterbacks who get paid for sitting on the bench" (467 U.S. at 943), "perfectly illustrate[d]" the rationale supporting the "modern view" inasmuch as "the general contractor is 'paid' with immunity precisely because he performs a back-up function, without which the [workers' compensation] system would not operate . . . ." 2A A. Larson, *supra*, at 14-180.

[24] In fact, a bill introduced in the Seventh Session of the D.C. Council contained a provision to amend the 1979 Act that was similar to Congress' 1984 Amendment to the Longshore Act. However, no action was taken on that bill. Another bill containing the same provision was introduced into the Eighth Session of the D.C. Council, but it, too, has not been acted upon.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

EDWIN A. SHERIDAN
DOHERTY, SHERIDAN & GRIMALDI
8408 Arlington Boulevard
Suite 200
Fairfax, Virginia 22031
(703) 698-7700
Counsel for Petitioner
KBR Corporation

JAMES C. GREGG
MACLEAY & LYNCH, P.C.
1625 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 785-0123
Counsel for Petitioner
Associated Builders, Inc.

JOSEPH P. DYER
JOHN A. SUTHERLAND, JR.
SICILIANO, ELLIS, DYER
& BOCCAROSSE
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692
Counsel for Petitioner
Faith Construction Co.

WALTER A. SMITH, JR.*
ROBERT B. CAVE
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
Co-Counsel for All Petitioners

* Counsel of Record

APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-577

CLARENCE MEIGGS, *et al.*,
Appellants,

v.

ASSOCIATED BUILDERS, INC.,

and

PINEDA-HELLER ELECTRIC COMPANY, INC.,
Appellees.

Nos. 86-100 & 86-125

OMNI CONSTRUCTION, INC.,
Appellant,

v.

SIDNEY FEATHERSTONE, *et ux.*,

and

ANDREW S. APPLING, *et ux.*,
Appellees.

No. 86-185

KBR CORPORATION,
Appellant,

v.

HARRY HOBBS, *et al.*,
Appellees.

No. 86-257

TERRY FRAZIER, *et al.*,
Appellants,

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Appellees.

Appeals from the Superior Court of
the District of Columbia

(Hon. Susan Holmes-Winfield, Trial Judge in No. 85-577)

(Hon. Gladys Kessler, Trial Judge in Nos. 86-100 & 86-125)

(Hon. Frederick H. Weisberg, Trial Judge in No. 86-185)

(Hon. Curtis E. von Kann, Trial Judge in No. 86-257)

(Argued August 19, 1986 Decided July 18,1988)

Patrick M. Regan and *Marc Fiedler*, with whom *Joseph H. Koonz, Jr.*, *Roger C. Johnson*, and *Mark J. Brice*, were on the brief, for appellants Meiggs and Frazier.

Walter A. Smith, Jr., with whom *Vincent H. Cohen*, *Robert B. Cave*, and *David F. Grady* were on the brief, for amicus curiae Washington Metropolitan Area Transit Authority.

Ronald G. Guziak and *Keith M. Bonner* were on the brief for appellant Omni Construction, Inc.

Edwin A. Sheridan was on the brief for amicus curiae KBR Corporation.

James C. Gregg and *Jack E. Rossotti* were on the brief for appellee Associated Builders, Inc.

Geoffrey S. Gavett was on the brief for appellee Pineda-Heller Electric Company, Inc.

Peter J. Vangsnes, Robert P. Enderle, and *H. Vincent McKnight, Jr.,* were on the brief for appellees Featherstone, Appling and Hobbs.

Joseph P. Dyer and *John A. Sutherland, Jr.* were on the brief for appellee Faith Construction Company.

Before MACK, ROGERS and STEADMAN, *Associate Judges.*[1]

MACK, *Associate Judge*: These five separate appeals, consolidated for our consideration, present an identical issue for resolution: do sections 5 (a) and 5 (b) of the District of Columbia Workers' Compensation Act of 1979, 27 D.C. Reg. 2503, 2507-08 (1980) (as codified at D.C. Code § 36-304 (1981) (hereinafter "1979 Act"), grant general contractors immunity from tort liability in suits brought by injured employees of subcontractors, where the subcontractors have secured payment of workers' compensation to the employees? The general contractors, in claiming immunity, cite to the Supreme Court's decision in *Washington Metropolitan Area Transit Authority v. Johnson,* 467 U.S. 925 (1984), as binding and persuasive precedent. The injured employees rely primarily upon the plain language of the statute and legislative history of the 1979 Act. We hold that general contractors, under these circumstances, are not entitled to statutory immunity under the District of Columbia Workers' Compensation Act.

Since the issue here is purely one of law, it is unnecessary to recite in detail the facts peculiar to each case.

---

[1] Associate Judge Steadman was selected as a member of the division to replace Senior Judge Nebeker, who withdrew from active judicial service on December 11, 1987.

Rather, it suffices to say that the plaintiffs[2] were employed by various subcontractors when they each sustained a work-related injury on a construction job site. The subcontractors, who had procured workers' compensation insurance for their employees, then secured the payment of such compensation to the injured plaintiffs who had each filed claims for benefits pursuant to the provisions of the Workers' Compensation Act of 1979. The injured plaintiffs thereafter brought independent negligence actions against, among others, the respective general contractors on the construction projects where their injuries were sustained. In the *Meiggs* and *Frazier* negligence suits, Judges Holmes-Winfield and Wertheim, respectively, entered summary judgment in favor of the general contractors on the basis of statutory immunity and the employees appealed. In *Hobbs*, *Appling* and *Featherstone*, Judges Weisberg and Kessler, respectively, determined that the statute did not bar suit and denied the general contractors' motions for summary judgment.[3] This court subsequently granted their applications to appeal the denial of such motions.

I.

The issue in this case arises as a result of the language in Section 5 (a)-(b) of the 1979 Act:

> (a) The liability of an *employer* prescribed in § 36-303 shall be exclusive and in place of all liability of such *employer* to the *employee* . . . .
>
> (b) The compensation to which an *employee* is entitled under this chapter shall constitute the *employ-*

---

[2] We use the terms plaintiff(s) and employee(s) synonymously throughout this opinion. We have not overlooked the fact that certain plaintiffs in these actions are actually spouses of the injured employees.

[3] Judge Kessler decided both *Appling* and *Featherstone*.

ee's exclusive remedy against the *employer* . . . . [Emphasis added.]

In arguing that "employer" should be interpreted to include "general contractor" when the underlying statute has not imposed an absolute duty on the contractor to secure payment of compensation, the contractors cite *Washington Metropolitan Transit Authority v. Johnson, supra.* The employees, on the other hand, look for support to this court's decision in *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), where we held that a general contractor is not an "employer" immune from liability under the provisions of the District of Columbia Worker's Compensation Act where the subcontractor secures insurance and pays compensation to the employee.

Johnson, like *DiNicola*, involved injuries to nonmaritime workers in the District of Columbia and therefore at issue in the case was the proper interpretation of the District of Columbia Workers' Compensation Act of 1928 (codified as amended at D.C. Code §§ 36-501 to -502 (1973) (hereinafter "1928 Act")). In *Johnson*, however, the Supreme Court made only a passing reference to the 1928 Act and then proceeded to interpret the Longshore and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424 (codified as amended at 33 U.S.C. § 901 to 950 (1982) (hereinafter "LHWCA")). The Court concluded that a general contractor is an employer for purposes of the LHWCA and therefore enjoys statutory immunity.

In our view, *Johnson* is not binding precedent in the instant appeals. While there is room for argument as to what law was the subject of the Supreme Court's interpretation in *Johnson*,[4] one thing is undisputed: the Su-

[4] It might be noted that the Supreme Court in *Johnson* never engaged in an analysis of what law governed the action nor did it consider whether the question raised was "local" or federal. Significantly, *Johnson* cites our decision in *DiNicola v. George Hyman Construction Co., supra,* without expressing any disapproval what-

preme Court *did not* interpret the District of Columbia Workers' Compensation Act of 1979. Equally clear is the fact that we are today called upon to interpret the 1979 Act. Since the principle of *stare decisis* has no application to a decision construing a different statute, this court is not bound by *Johnson*. On a question of purely local law, this court is undeniably the final arbiter. D.C. Code § 11-102 (1981) ("The highest court of the District of Columbia is the District of Columbia Court of Appeals."). *See also Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979) (D.C. Court of Appeals is "the final expositer of the local law of the District of Columbia."); *Reichman v. Franklin Simon Corp.*, 392 A.2d 112 (D.C. 1978).

Johnson also has very little, if any, persuasive value in the context of these cases. Shortly after the Supreme Court's decision in 1984, Congress passed amendments to the LHWCA with the express purpose of divesting *Johnson* of any past or subsequent precedential effect. Congress concluded that *Johnson* did "not comport with the legislative intent of the [LHWCA] nor its interpretation from 1927 through 1983." H.R. CONF. REP. No. 1027, 98th Cong., 2nd Sess. 24 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2771, 2774. This repudiation of the *Johnson* interpretation by the Congress is telling. Significantly, the reasoning underlying *Johnson* had been rejected by our own court in *DiNicola*, *supra*, just six months before the Council of the District of Columbia passed the 1979 legislation.

II.

Freed of the encumbrances flowing from contradictory judicial interpretations,[5] and strained reliances on *John-*

---

soever of its reasoning or result. *See Johnson*, *supra*, 467 U.S. at 933-34. We reserve for another day a comprehensive development of this issue.

[5] In addition to the disagreement in the five present cases, there is a comparable division in the lower federal courts of the District

son, the issue is a simple one. Who is an employer immune from tort liability under the provisions of the District of Columbia Workers' Compensation Act of 1979?

The starting point for analysis is, of course, the language of the statute itself. The statute makes the meaning of "employer" abundantly clear. Under the Act:

> "Employer" includes any individual, firm, association, or corporation, or receiver, or trustee of the same, or the legal representative of a deceased employer, using *the service of another for pay* within the District of Columbia.

D.C. Code § 36-301 (10) (1981) (emphasis added).[6] A reasonable reading of the statute leads to the conclusion that the "service of another" to which the definition refers is the service of an "employee." The Act defines employee:

> "Employee" includes every person, including a minor, in the service of another *under any contract of hire or apprenticeship*, written or implied, in the District of Columbia . . . .

Id. § 36-301 (9) (emphasis added). Thus, an employer and its employee enjoy a written or implied contractual

---

of Columbia. In *Ford v. United States*, No. 84-3082 (D.D.C. 1985) (memorandum order), and *Stokes v. George Hyman Construction Co.*, No. 84-1418 (D.D.C. 1985) (memorandum order), the district court for the District of Columbia held that a general contractor is entitled to immunity. In *Allen v. United States*, 625 F. Supp. 841 (D.D.C. 1986), the court concluded that a general contractor is not entitled to immunity.

[6] Justice Marshall, writing for the majority in *Washington Metropolitan Area Transit Authority v. Johnson*, *supra*, pointed out that the immunity provision of the LHWCA "speaks in terms of 'an employer' and, at least as far as the employees of subcontractors are concerned, a general contractor does not act as an employer." *Johnson*, *supra*, 467 U.S. at 933.

relationship under which the services of the employee are exchanged for payment from the employer.

In the consolidated cases here, the general contractors and plaintiffs were not involved in an employer/employee relationship. For example, in *Meiggs*, Associated Builders did not hire Meiggs, did not pay Meiggs, and held no contract whatsoever with Meiggs. Likewise, Meiggs did not render service for Associated Builders. Rather Meiggs rendered service for Pineda-Heller, who hired Meiggs, paid Meiggs and exercised exclusive control over him. Pineda-Heller was Meiggs' employer. Under a literal interpretation of the immunity provision, no immunity ran to Associated Builders in regard to Meiggs.[7] Indeed, in some jurisdictions, the inquiry would be at an end and immunity would simply be rejected. *Fiore v. Royal Painting Co.*, 398 So. 2d 863, 865 (Fla. Dist. Ct. App. 1981); *Sweezey v. Arc Electrical Construction Co.*, 295 N.Y. 306, 310-11, 67 N.E.2d 369, 370-71 (1946).

Questions regarding the literal interpretation of the meaning of the word "employer" in the immunity provision arise only out of the interplay between the immunity provision and the liability provision:

> (b) Every employer subject to this chapter shall be liable for compensation for injury or death . . . .
>
> (c) In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor *unless* the subcontractor has secured such payment.

Id. at § 36-303 (b)-(c) (emphasis added). Under these provisions, a general contractor incurs a secondary liability to secure payment of workers' compensation when a subcontractor has not secured payment. Consequently, if

---

[7] This reasoning applies with equal force to the other decisions on appeal.

a subcontractor defaults, a general contractor can argue that unless it is *constructively* deemed the "employer" of the subcontractor's employees for purposes of the immunity provision, it will incur double liability: workers' compensation and common law tort liability. The argument continues that in light of results unfair to the general contractor, the literal interpretation of the meaning of the word "employer" in the immunity provision (and all other provisions in the 1979 Act) must give way.

Such an argument, however, has force only when the general contractor is legally required to secure payment of compensation to a subcontractor's employees. Otherwise, double liability is not a possibility. Indeed, double liability to Associated Builders was not a possibility here. The subcontractor, Pineda-Heller, "secured" payment of compensation to its employee Meiggs and thus fulfilled its statutory obligation under § 36-303 (b)-(c). Additionally, Associated Builders did not "secure" payment of compensation to Meiggs under its contingent § 36-303 (c) duty. Consequently, double liability was not possible, and no reason has been advanced nor exists for engaging in the legal fiction of constructively deeming Associated Builders Meiggs' "employer" when it is clear Pineda-Heller is Meiggs' *actual* employer. This is likewise true of the other subcontractors here since none defaulted on their statutory obligations.

Thus, even if it is sometimes appropriate to constructively deem a general contractor the "employer" of a person clearly not its employee, the *most* that follows is that such creative statutory interpretation is appropriate *only* when the actual employer—the subcontractor —defaults on its statutory obligation, and the general contractor steps in to secure payment. *See Johnson, supra*, 467 U.S. at 945 (Rehnquist, J., dissenting).

This conclusion is buttressed by looking at the use of "employer" in the remainder of the 1979 Act. The word

"employer" is used throughout the Act. Section 36-307 specifies the medical services the "employer" is required to furnish; § 36-313 requires employees to give their "employers" notice of injuries; and § 36-335 (b) requires employees to assign their rights to third party damages to their "employers" if the employee accepts workers' compensation. If, regardless of subcontractor default, the general contractor were deemed the "employer" for all these purposes, notice would twice be required, "[b]oth the contractor and the subcontractor would be directed to make the payments required by [§ 36-307], and both would simultaneously be entitled to the assignment of the injured worker's right to recover damages from third parties under § [36-335 (b)]. Everything directed by the Act would be done in duplicate." *Johnson, supra*, 467 U.S. at 944-45 (Rehnquist, J., dissenting). If, however, the general contractor were deemed the "employer" of the subcontractor's employees only when the subcontractor defaulted, no duplication would occur. In the appeals before us, it is undisputed that Associated Builders, Faith Construction Co. and the other corporate defendants were "contractors" within the meaning of D.C. Code § 36-303 (c) (1981).[8] It should likewise be clear that they are "third persons"—not contractors within the meaning of that provision who can be equated with the status of immunized employers by virtue of the failure of the subcontractors to secure payment.

III

A.

Not only is our conclusion consistent with the plain language and overall structure of the 1979 Act, it is also

---

[8] In *Johnson*, the Supreme Court relied on the lower courts' findings that WMATA was a "contractor" within the meaning of the liability provisions. *Johnson, supra*, 467 U.S. at 924 n.5. There "WMATA elected to assume responsibility for securing workers' compensation insurance for all Metro construction employees." *Id.* at 929.

consistent with the intent of the Council of the District of Columbia when it enacted this legislation.

Just recently, this court reiterated the local adaptation of what is a universally recognized principle of statutory construction:

> When a local provision is borrowed directly from a federal statute, the Council [of the District of Columbia] is presumed to have borrowed the judicial construction thereof as well.

Hughes v. District of Columbia Department of Employment Services, 498 A.2d 567, 571 n.8 (D.C. 1985) (citing *Whitt v. District of Columbia*, 413 A.2d 1301, 1303-04 (D.C. 1980)). This "local" version takes its origin from the cardinal rule of statutory construction that when a legislature adopts a statute that is modeled after one in effect in another jurisdiction, the legislature is deemed to have adopted as well the judicial constructions of the statute in the jurisdiction in which it originated. *Yates v. United States*, 354 U.S. 298, 309 (1957); *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944); *see generally* 2A SUTHERLAND, STATUTORY CONSTRUCTION § 51.02 (Sands 4th ed. 1984). It is particularly appropriate that this presumption be applied in this controversy, where the prior judicial constructions "adopted" are our *own*; that is, our interpretations of provisions of acts of Congress which are incorporated verbatim into the Council's new legislation.

Of course, as this court has emphasized, this rule applies only to such judicial constructions as have been placed on the "borrowed" statute *prior* to its enactment by the jurisdiction adopting it. *Whitt*, *supra*, 413 A.2d at 1303-04. Any subsequent interpretations by this court will be binding on us; any subsequent interpretations by another court carry no precedential value.

It is important, therefore, to review the legal landscape facing the Council when it debated and ultimately

enacted the 1979 Act. At that time, three cases had explicitly interpreted the immunity provision of the federal LHWCA as it applied to the District of Columbia through the 1928 incorporation. In *Liberty Mutual Insurance Co. v. Goode Construction Co.*, 97 F. Supp. 316 (E.D. Va. 1951), a federal court held that a general contractor was a "third person" under the 1928 Act and thus could be sued by the subcontractor's employee. In *Liberty Mutual*, the subcontractor carried workers' compensation insurance. The court observed that the employee

> made no contract of employment with the defendant [the general contractor], that his contract was with the subcontractor, that the terms of his contract did not foreclose his right against anyone save his employer, and that his agreement is not to be curtailed *except by law or his consent and neither has done so.*

Id. at 317 (emphasis added).

Subsequently, in *Thomas v. George Hyman Construction Co.*, 173 F. Supp. 381 (D.D.C. 1959), the federal District Court for the District of Columbia, which at the time had jurisdiction over local matters, denied immunity to a general contractor where both the general contractor and the subcontractor had secured workers' compensation insurance. The court eloquently set forth the rationale behind its decision to give the statute its plain language interpretation:

> The law requires [the general contractor] to carry insurance only if the subcontractor fails to do so. In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance. He may not, however, voluntarily take out insurance that the law does not require and thereby secure freedom from liability for negligence. . . . Release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so. One may

> not escape from such liability by taking out insurance that the law does not require.

Id. at 383.

Finally, in *DiNicola v. George Hyman Construction Co.*, *supra*, this court reaffirmed the principles enunciated in *Liberty Mutual* and *Thomas v. George Hyman Construction Co.* The *DiNicola* court held that a general contractor is not an "employer" immune from liability under the provisions of the Act where the subcontractor secures insurance and pays compensation to the employee. *Id.* at 672. The *DiNicola* court, not satisfied with simply supporting its interpretation by reference to prior interpretations of the 1928 Act, set forth the substantial body of federal and state cases supporting its plain language interpretation. Citing those cases, the *DiNicola* court found that "[t]he majority of courts interpreting statutes similar to the [LHWCA] have reached similar results" to the one the court reached. *Id.* at 674.[9]

---

[9] This comports with the Fifth Circuit's 1967 description of the general terrain:

> The two main lines of decision—(1) general contractor may be sued, (2) the general contractor may not be sued—arise out of compensation statutes which, in turn, follow two principal divisions. In the first are those statutes which require the general employer or general contractor to see that any and all independent contractors or subcontractors carry compensation insurance or suffer statutory liability for compensation to the employees of the subcontractors. In the second category are those which directly impose liability on the general employer or the general contractor, as the case may be, for injuries to the employees of any independent contractors or subcontractors. . . . Under the first type of statute, the state case law generally denies to the general contractor the employer's immunity and permits third party suit against him. Under statutes of the second kind imposing a direct liability, the cases with a good deal of good sense regard the general contractor as the vicarious employer and extend the employer's immunity to him.

Probst v. Southern Stevedoring Co., 379 F.2d 763, 765-66 (5th Cir. 1967) (footnote omitted).

Two other cases, not directly on point, give further evidence of the substantive body of law facing the Council when it engaged in the difficult task of drafting a workers' compensation statute for the District. In *Lindler v. District of Columbia*, 164 U.S. App. D.C. 35, 502 F.2d 495 (1974), the United States Court of Appeals for the District of Columbia Circuit held that the Workers' Compensation Act of 1928 did not bar suit against the District of Columbia by employees of *independent* contractors hired by the District for municipal projects. Furthermore, in *Martin v. George Hyman Construction Co.*, 395 A.2d 63 (D.C. 1978), this court assumed, without discussion, that an injured employee of a subcontractor was permitted to maintain a negligence action against a general contractor.

Thus, on May 6, 1980, when the Council passed the 1979 Act, every case interpreting the immunity provisions of the 1928 Act unambiguously rejected contractor immunity if the subcontractor fulfilled its obligation to secure payment of worker's compensation. Indeed, *DiNicola* was one of three identical judicial constructions of the immunity provision, two of which were on the books long before the 1979 bill was ever introduced.

B.

The intent of the Council of the District of Columbia can also be inferred from the affirmative legislative record surrounding the passage of the 1979 Act. When the Council drafted the 1979 Act, it explicitly reviewed the Maryland Workers' Compensation Act. *See* COMMITTEE ON HOUSING AND ECONOMIC DEVELOPMENT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA, REPORT ON BILL NO. 3-106: THE "DISTRICT OF COLUMBIA WORKERS' COMPENSATION ACT OF 1979" at 4, 6, 10, 13 (January 29, 1980). The Maryland Act includes a provision subjecting a principal contractor to an absolute duty to secure workers' compensation. MD. ANN. CODE art. 101, § 62 (1985). Moreover, it deems a principal contractor an

employer for purposes of the Act: "[I]n the application of this article, reference to the principal contractor shall be substituted for reference to the employer." *Id.* Despite the fact that the Council modeled some of the 1979 Act provisions after those in the Maryland Act, *compare* D.C. Code § 36-308 to -311 (1981) *with* MD. ANN. CODE art. 101, § 36 (1981), it did not engraft onto our 1979 Act the provision explicitly substituting the words "principal contractor" for the word "employer." Rather, it chose to retain the language of the 1928 Act which granted immunity only to "employers."

IV.

Our conclusion is also consistent with the philosophy underlying workers' compensation schemes. That philosophy has commonly been described as a *quid pro quo* on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity; in return for giving up the right to sue the employer, the employee receives swift and sure benefits. Interpretation of the 1979 Act to confer immunity on general contractors would transform the underlying philosophy of workers' compensation into a *duo quidem pro sole unum quo.* The employee would be required to give up at least two immunities—one to the general contractor and one to the subcontractor—for the price of one. The bargain becomes more unattractive with every "sub" prefixed to the word "contractor." Employees unfortunate enough to be employed by a sub-sub-sub-subcontractor find that, in addition to the employer, four possibly negligent actors are immune from liability. *See Johnson, supra,* 467 U.S. at 927 n.3, 940 n.14 (subcontractors and sub-subcontractors of voluntarily insured general contractors are also immune).

Principles of statutory construction further reinforce our conclusion. The first of these principles is that statutes are to be strictly construed against the abrogation of common law rights unless that intent is clearly ex-

pressed. *Dell v. Department of Employment Services*, 499 A.2d 102, 107 (D.C. 1985) (citing *Shaw v. Railroad Co.*, 101 U.S. (11 Otto) 557, 565 (1879)). The second is that workers' compensation statutes are to be construed liberally in favor of the worker in order for them to achieve their humane purpose. *Ferreira v. Department of Employment Services*, 531 A.2d 651, 665 (D.C. 1987); *J.V. Vozzolo, Inc. v. Britton*, 126 U.S. App. D.C. 259, 262, 377 F.2d 144, 147 (1967).

V.

We would also point out that our analysis does not facilitate double recovery by an employee. The Council expressly wrote protections against such "windfalls" into the 1979 Act.

Under § 36-335, if an employee believes his injury is the result of the negligence of a third person, the employee may engage in two courses of conduct after he accepts a workers' compensation award from his employer.[10] He may do nothing for six months, in which case his right to recovery against the third person is automatically assigned to his employer. *Id.* at § 36-335 (b). The employer may then either institute proceedings for the recovery of damages or may compromise with the third person with or without instituting proceedings. *Id.* at § 36-335 (d). In any case, if damages are recovered from a third person, the employer is entitled to retain such amount as covers all its costs in instituting the proceedings and all amounts paid and payable to the employee as workers' compensation. *Id.* at § 36-335 (e) (1). The employer is also entitled to twenty percent of the excess of recovery over costs, thus leaving the employee with eighty percent of what his common law tort remedy would have netted. *Id.* at § 36-335 (e) (2). Clearly, such a result is not a "windfall" to the employee.

---

[10] The options available to the personal representative of a decedent are distinct. D.C. Code § 36-335 (c). That provision is not relevant to these appeals, where injury, not death, occurred.

The second course of conduct open to the employee is to commence proceedings against the "third person" within six months after acceptance of the workers' compensation award from the employer. *Id.* at § 36-335 (b). If the employee recovers civil damages in the subsequent proceedings, the employer is "required to pay" to the employee *only for* the amount by which the workers' compensation award *exceeds* the civil damage award. *Id.* at § 36-335 (f). In other words, if the civil damage award exceeds the workers' compensation award, the employer is not required to tender payment of any workers' compensation benefits. Here again, double recovery is not a possibility. The most an employee receives is the common law tort remedy from a third party who has been adjudicated negligent.

Section 36-335 of the Workers' Compensation Act of 1979 is not an accidental feature of the legislation. It reflects a conscious legislative policy to permit an employee to pursue his full common law remedy when the employee believes that the negligence of a third person caused his injury. Here again, the language of § 36-335 is clear and unambiguous. It speaks in terms of employers and employees. Furthermore, it specifically defines "third persons" as persons other than:

> the employer, or any collective-bargaining agent of the employer's employees, and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent.

D.C. Code § 36-304 (b) (incorporated by reference in § 36-335 (a)). Clearly, "general contractor" is not included in this list of excluded "third persons."

Accordingly, the orders in *Featherstone*, *Appling* and *Hobbs* are affirmed and the judgments in *Meiggs* and *Frazier* are reversed.

So ordered.

Associate Judge STEADMAN concurs in the result.

APPENDIX B

SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 2563-84

CLARENCE MEIGGS, *et al.*,
Plaintiff

vs.

ASSOCIATED BUILDERS, INC.,
Defendant & Third-Party Plaintiff

vs.

PINEDA/HELLER ELECTRIC CO., INC., JOINT VENTURE,
Third-Party Defendant.

ORDER

Upon consideration of the Motion for Summary Judgment filed herein by and on behalf of defendant, Associated Builders, Inc., against the plaintiff, Clarence Meiggs, of the Statement of Material Facts as to Which There is No Genuine Issue, and of the Memorandum of Points and Authorities filed in support thereof, and of Superior Court Rules of Civil Procedure 56(b), and of the record herein, it is, by the Court, this 1st day of May, 1985,

ORDERED, that said Motion be, and the same hereby is granted and that judgment is hereby entered in favor

of the defendant Associated Builders Inc., against plaintiff, Clarence Meiggs.

/s/ Susan R. Holmes
Judge

COPIES TO:

James C. Gregg, Esquire
Samuel F. McNeill, III, Esquire
1625 Eye Street, N.W., #512
Washington, D. C. 20006

Patrick M. Regan, Esquire
Suite 840
2020 K Street, N.W.
Washington, D. C. 20006

Geoffrey S. Gavett, Esquire
Suite 15A
751 Rockville Pike
Rockville, MD 20852

APPENDIX C

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil No. 6602-84

TERRY FRAZIER, *et al.*
Plaintiffs

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Defendants.

ORDER

Defendant has moved for summary judgment, contending that as a matter of law it has no liability due to sections 4(c) and 5(a) of the D.C. Worker's Compensation Act (DCWCA), D.C. Code §§ 36-303(c) and 36-304(a) (1981), in light of *WMATA v. Johnson*, —— U.S. ——, 104 S. Ct. 2827 (1984). Plaintiff's opposition argues that *Johnson* construes only the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA), 33 U.S.C. §§ 901-950 (1978) and thus does not control our interpretation of the DCWCA.

The Court agrees with defendant and finds *Johnson* persuasive for three reasons. First, the federal statute construed by the Supreme Court in *Johnson* (prior to the 1984 Amendments to the LHWCA, Pub. L. No. 98-426, 98 Stat. 1641, (1984)) is identical in all material respects to the provisions of the DCWCA here at issue.

Second, plaintiff has identified nothing in the respective legislative histories of the two statutes to warrant differing interpretations. Third, and most compelling, the D.C. Court of Appeals has just recently found *Johnson* persuasive in construing workers' compensation claims brought in this jurisdiction under the local act. *See O'Connell v. Maryland Steel Erectors, Inc.*, No. 82-1486 (D.C. July 5, 1985), *approving In Re Metro Subway Accident Referral*, Misc. 82-306 (D.D.C. Dec. 18, 1984); *see also Montag v. Fischbach & Moore Corp.*, C.A. No. 4634-83 (D.C. Super. Ct. Feb. 13, 1985).

Accordingly, defendant's motion for summary judgment is granted on the conditions that:

(1) Within thirty days of the date of this Order, defendant file documentary proof that at the time of the accident in question defendant was insured in compliance with D.C. Code § 36-303(c) (1981), or alternatively that the parties file a stipulation to the same effect; and

(2) that absent such stipulation, plaintiff has not within sixty days of the date of this Order shown that there is a genuine issue as to whether defendant had so complied with D.C. Code § 36-303(c) (1981).

The Court notes that although defendant represents without contradiction in its pre-trial statement that it "did provide a secondary workmen's compensation coverage," the proof on this point is insufficiently specific, particularly given § 5 of the construction contract appended to defendant's motion. The only other relevant reference in the present record is defendant's answer to Interrogatory No. 34, which lists Safeco Insurance Company as an indemnifier but does not provide enough information to demonstrate compliance with D.C. Code § 36-303(c) (1981).

SO ORDERED.

July 23, 1985

Date

/s/ Ronald P. Wertheim
JUDGE RONALD P. WERTHEIM

cc: Mark J. Brice, Esq.
Koonz, McKenney & Johnson, P.C.
2020 K Street, N.W.
Suite 840
Washington, D.C. 20006

Joseph P. Dyer, Esq.
Siciliano, Ellis, Sheridan, Dyer & Boccarosse
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030

APPENDIX D

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 803-84

HARRY HOBBS, SHELBY HOBBS,
Plaintiffs

v.

KBR CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendant's motion for summary judgment and plaintiffs' opposition thereto. The question presented by defendant's motion is whether, under the District of Columbia Workers' Compensation Act of 1979 (hereinafter, the 1979 Act), a general contractor may be sued in tort by the injured employee of its subcontractor, where the employee has received compensation for his injury under his employer's workers' compensation coverage.[1] The answer to this question turns on a determination of what the District of Columbia

---

[1] This question is currently pending before the United States Court of Appeals for the District of Columbia Circuit in *Stokes* v. *George Hyman Construction Company*, No. 85-5147. This court recently decided a related question in *Peake* v. *Donohoe Construction Company, Inc.*, C.A. No. 15231-82 (motion for summary judgment granted, October 24, 1985). *Peake*, however, involved a claim arising under the Workmen's Compensation Act of 1928, and accordingly the analysis of the question presented in that case necessarily differs from the correct analysis of the question presented here.

Council intended when it wrote into the 1979 Act language imported from the Longshoremen's and Harbor Workers' Compensation Act of 1927 (hereinafter, the Longshoremen's Act), which had been the prior law in the District of Columbia by virtue of the District of Columbia Workmen's Compensation Act of 1928 (hereinafter, the 1928 Act).

The material facts are not in dispute. On or about December 1, 1982, plaintiff Harry Hobbs was injured on the job while working for his employer, Benson & Bowles, a subcontractor of defendant KBR Corporation. Thereafter, plaintiff obtained workers' compensation benefits from his employer under the employer's compensation coverage. Plaintiffs also filed this action against KBR Corporation, alleging that its negligence was the cause of Mr. Hobbs' injury.

There is no dispute that the defendant's immunity from suit, *vel non*, is governed by the provisions of the 1979 Act. The Act was passed by the Council of the District of Columbia and became law on July 1, 1980. After an unsuccessful lawsuit challenging the authority of the Council to legislate in this area, the Act finally went into effect on July 24, 1982. It governs all claims arising after that date. *Garrett* v. *Washington Air Compressor*, 466 A.2d 462 (D.C. 1983). The relevant sections of the 1979 Act, 36 D.C. Code §§ 303, 304, provide:

> Section 36-303. Coverage.
>
> (a) . . .
>
> (b) Every employer subject to this chapter shall be liable for compensation for injury or death without regard to locality of injury or to fault as a cause of the injury or death.
>
> (c) In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of

the subcontractor unless the subcontractor has secured such payment.

Section 36-304. Exclusiveness of liability and remedy.

(a) The liability of an employer prescribed in § 36-303 shall be exclusive and in place of all liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.

(b) The compensation to which an employee is entitled under this chapter shall constitute the employee's exclusive remedy against the employer . . . for any illness, injury, or death arising out of and in the course of his employment: Provided, that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death. . . .

The language of these provisions was borrowed almost verbatim from the analogous provisions of the Longshoremen's Act. In 1980, those sections, as codified, provided:

33 U.S.C. § 904. Liability for compensation.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

33 U.S.C. § 905. Exclusiveness of liability.

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place

> of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law . . . on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law . . . for damages on account of such injury or death. . . .

Before 1980, the precise question presented by this case had arisen under the 1928 Act and the Longshoremen's Act. In *DiNicola* v. *George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), the Court construed sections 4(a) and 5(a) of the Longshoremen's Act and held that where the employer is a subcontractor who secures payment of compensation to its injured employee, only the subcontractor, and not the general contractor, is immune from suit by the employee. *See also Thomas* v. *George Hyman Construction Co.*, 173 F. Supp. 381 (D.D.C. 1959). *DiNicola* was the law on this point until 1984 when, in a District of Columbia case, the Supreme Court held that under sections 4(a) and 5(a) of the Longshoremen's Act a general contractor is immune from suit by the injured employee of its subcontractor as long as the general contractor has not failed to secure payment of compensation to the employee after a default by the subcontractor. *Washington Metropolitan Area Transit Authority* (WMATA) v. *Johnson*, 104 S. Ct. 2827 (1984). The majority in *WMATA* v. *Johnson* recognized that to construe the statute to include a general contractor as the "employer" of the injured employee of the subcontractor was not entirely consistent with the ordinary definition of an employer or with the plain language of the statute. 104 S. Ct. at 2833. Nonetheless, the Court concluded, over a spirited dissent joined by three Justices, that its construction was consistent with the

intent of Congress and better served the purposes of the overall statutory scheme for workers' compensation.[2]

Defendant argues that this court ought to ignore *DiNicola* and follow *WMATA* v. *Johnson* because the Supreme Court's construction of sections 4(a) and 5(a) of the Longshoremen's Act is dispositive and because, in defendant's view, *WMATA* v. *Johnson* represents the modern trend in workers' compensation law and makes good sense as a matter of social and economic policy. The problem with defendant's argument, even if one were to accept all of its premises, is that it completely misconceives the proper role of this court. The question here is a pure question of statutory construction. The question is not whether the reasoning of the Supreme Court in *WMATA* v. *Johnson* is better than the reasoning of the Court in *DiNicola*. Nor is the question whether the Council in 1980 could have made general contractors immune from suit or, for that matter, whether it should have. The question is whether it did. That question

---

[2] Apparently the Congress did not agree. When the Congress saw what the Supreme Court had done in *WMATA* v. *Johnson*, it immediately amended sections 4(a) and 5(a) of the Longshoremen's Act to make it clear that a general contractor was not immune from suit by the injured employee of its subcontractor unless it was actually required to secure payment of compensation to the employee after a default by the subcontractor. Longshoremen and Harborworkers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639. The 1984 amendments to the Longshoremen's Act are not relevant to the proper disposition of this case for at least three reasons: (1) this case arises under the 1979 Act, not the 1928 Act which incorporated the Longshoremen's Act; (2) Congress did not amend even the 1928 Act, which was repealed and replaced by the 1979 Act before the amendments were passed (*O'Connell* v. *Maryland Steel Erectors, Inc.*, D.C. App. No. 82-1486, dec. July 5, 1985, *pet. for reh. en banc denied* October 21, 1985); and (3) an act of Congress in 1984 could not possibly be relevant to a proper determination of the intent of the District of Columbia Council in 1980 when it passed the 1979 Act. The 1984 amendments do, however, undermine the precedential value of *WMATA* v. *Johnson*, on which defendant principally relies.

must be answered by reference to the ordinary rules of statutory construction.

The starting place for any question of statutory construction is the language of the statute itself. *Washington* v. *United States*, 498 A.2d 247, 248 (D.C. 1985); *Varela* v. *Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64 (D.C. 1980) (*en banc*). As is apparent from the conflicting decisions in *DiNicola* and *WMATA* v. *Johnson*, the words of this statute will admit of more than one interpretation. It is at least arguable that the *DiNicola* Court hewed more closely to the statutory language than the Supreme Court. Indeed, even the majority in *WMATA* v. *Johnson* admitted that its reading was not entirely faithful to the words of the statute.

More importantly, when the Council acted in 1980, the *only* construction of sections 4(a) and 5(a) of the Longshoremen's Act was the *DiNicola* rule—no immunity.[3] The Supreme Court was of course free to reach a different result; but it did so in 1984, four years after the Council had enacted its new Workers' Compensation Act for the District of Columbia. Although the new Act borrowed the language from the Longshoremen's Act, it does not follow that *later* interpretations of the Longshoremen's Act become relevant to a determination of the Council's legislative intent.[4] Instead, the correct rule of

---

[3] Before *WMATA* v. *Johnson*, the only Circuit to have passed on this question also sided with *DiNicola*. *Probst* v. *Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967).

[4] Defendant argues that because sections 303 and 304 of the 1979 Act come directly from sections 4(a) and 5(a) of the Longshoremen's Act, and *WMATA* v. *Johnson* is the "last word" on the meaning of sections 4(a) and 5(a), this court should follow the decision of the Supreme Court in its construction of sections 303 and 304. It is true that subsequent judicial constructions of a predecessor statute may be helpful in construing a successor statute, where there had been no authoritive judicial construction of the predecessor statute in existence at the time the successor statute was enacted. *See* 82 C.J.S. *Statutes* § 373(b) (1953); 2A Suther-

statutory construction is that when a legislature enacts a statute taken verbatim or substantially verbatim from the statute of another jurisdiction, it is deemed to have adopted *prior* constructions of the statute in the jurisdiction in which it originated. 2A Sutherland, Statutory Construction § 52.02, 322-24 (4th ed. 1984); *Hughes* v. *District of Columbia Department of Employment Services*, D.C. App. No. 84-264, dec. Oct. 4, 1985, slip. op. at 8 n.8; *cf. Whitt* v. *District of Columbia*, 413 A.2d 1301, 1304 (D.C. 1980).[5] The presumptive force of the rule is even stronger where, as here, a legislature borrows from a statute that was previously construed authoritatively by the highest court in its own jurisdiction. It is highly improbable that in 1980, when the Council imported sections 4(a) and 5(a) of the Longshoremen's Act into its new Workers' Compensation Act, it paid no attention to

---

land, Statutory Construction § 52.02, 322-24 (4th ed. 1984); *cf. Hawley* v. *Hawley*, 72 App. D.C. 376, 380, 114 F.2d 745, 749 (1940). But where, as here, the predecessor statute had been authoritatively construed by the highest court in the jurisdiction at the time the successor statute was enacted, a subsequent judicial construction of the predecessor statute—even by the Supreme Court—which effectively overrules the construction of the statute given in the earlier case, is of no value in determining the intent of the legislature when it enacted the successor statute.

[5] Coincidentally, one of the clearest statements of the rule appears in *Hartford Accident & Indemnity Co.* v. *Hoage*, 66 App. D.C. 154, 156, 85 F.2d 411, 413 (1936), a case which construed the Longshoremen's Act in light of its own historic origins in the workers' compensation statutes of New York:

> The Longshoremen's Act followed in the main the Workmen's Compensation Law of the State of New York. It is familiar law that whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which have received in that state a known and settled construction *before* their enactment by Congress, that construction will be deemed to have been adopted by Congress together with the text which it expounded, and the provisions will be construed as they were understood in the State. (emphasis in original, footnotes and citations omitted).

the construction of those same provisions by the District of Columbia Court of Appeals in 1979.[6] If it thought that *DiNicola* made bad law or bad policy—as defendant asserts here—the Council could easily have drafted a statute consistent with that position. That it did not do so, and instead took the language virtually verbatim from the Longshoremen's Act, is strong evidence of its intent to adopt the *DiNicola* rule.

Neither party has cited any legislative history of the 1979 Act that adds very much to the analysis of the issue presented by this case. The legislative history does demonstrate that the Council was borrowing heavily from the Longshoremen's Act, departing only where necessary to serve a particular local purpose. Where there were departures, the Committee Report explained the changes, and the reasons for them. In its discussion of sections 4 and 5 of the new Act, which were taken from sections 4(a) and 5(a) of the Longshoremen's Act, the Committee Report makes note of certain changes—not relevant to the issue presented here—but says nothing at all reflecting an intent to change the *DiNicola* rule on immunity of general contractors. *See* Council of the District of Columbia, Report of the Committee on Housing and Economic Development, Bill 3-106, January 29, 1980, at 10, 13-14. From its silence, it is reasonable to conclude that the Council intended to carry forward into Sections 4 and 5 of the new Act the construction of sections 4(a) and 5(a) of the Longshoremen's Act by the Court in *DiNicola*.

The correct application of the rules of statutory construction lead to but one conclusion: under the 1979 Act a general contractor is not immune from suit by an in-

---

[6] Even though *DiNicola* involved an interpretation of the Longshoremen's Act, the Court in *DiNicola* was construing local law. *District of Columbia* v. *Greater Washington Central Labor Council, AFL-CIO*, 442 A.2d 110, 116 (D.C. 1982), and cases cited therein.

jured employee of its subcontractor unless the general contractor secures the payment of statutory compensation to the injured employee after the subcontractor fails to secure such compensation. Because in this case the subcontractor secured the payment of compensation to its employee, the general contractor is not immune from suit. Accordingly, it is this 19th day of November, 1985

ORDERED that defendant's motion for summary judgment be, and it hereby is, denied.

/s/ Judge Frederick H. Weisberg
JUDGE FREDERICK H. WEISBERG
(Signed in Chambers)

November 19, 1985
Date

Copies to:

H. Vincent McKnight, Jr., Esquire
2000 L. Street, N.W., Suite 700
Washington, D.C. 20036

Edwin A. Sheridan, Esq.
8408 Arlington Blvd., Suite 200
Fairfax, Virginia 22031

APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-577

CLARENCE MEIGGS, *et al.*,
Appellants,

v.

ASSOCIATED BUILDERS, INC. AND
PINEDA-HELLER ELECTRIC COMPANY, INC.,
Appellees.

CA 2563-84

No. 86-100

OMNI CONSTRUCTION, INC.,
Appellant,

v.

SIDNEY FEATHERSTONE, *et ux.*,
Appellees.

CA 4031-84

No. 86-125

OMNI CONSTRUCTION, INC.,
Appellant,

v.

ANDREW S. APPLING, *et ux.*,
Appellees.

CA 4030-84

No. 86-185

KBR CORPORATION,
Appellant,

v.

HARRY HOBBS, *et al.*,
Appellees.

CA 803-84

No. 86-257

TERRY FRAZIER, *et al.*,
Appellants,

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Appellees.

CA 6602-84

On Appeal from the Superior Court
of the District of Columbia
Civil Division

Before: MACK, ROGERS and STEADMAN,* *Associate Judges.*

JUDGMENT

This cause came on to be heard on the transcript of record, the briefs filed, and was argued by counsel. On

---

* Associate Judge Steadman was selected as a member of the division to replace Senior Judge Nebeker, who withdrew from active judicial service on December 11, 1987.

consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED by this court that the orders on appeal in Nos. 86-100, 86-125 and 86-185 are affirmed. It is

FURTHER ORDERED and ADJUDGED that the judgments on appeal in Nos. 85-577 and 86-257 are reversed.

For the Court:

/s/ R. B. Hoffman
RICHARD B. HOFFMAN
Clerk

Dated: July 18, 1988.

Opinion per Associate Judge Julia Cooper Mack.

APPENDIX F

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellants,

v.

CONSTRUCTION GENERAL, INC., *et al.*,
Appellees.

CA126-81

No. 85-577

CLARENCE MEIGGS, *et al.*,
Appellants,

v.

ASSOCIATE BUILDERS, *et al.*,
Appellees.

CA2563-84

No. 86-100

OMNI CONSTRUCTION, INC.,
Appellant,

v.

SIDNEY FEATHERSTONE, *et ux.*,
Appellees.

CA4031-84

No. 86-125

OMNI CONSTRUCTION, INC.,
Appellant,

v.

ANDREW A. APPLING, *et ux.*,
Appellees.

CA4030-84

No. 86-185

KBR CORPORATION,
Appellant,

v.

HARRY HOBBS, *et al.*,
Appellees.

CA803-84

No. 86-257

TERRY FRAZIER, *et al.*,
Appellants,

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Appellees.

CA6602-84

Before: * ROGERS, *Chief Judge*; * MACK, NEWMAN, FERREN, BELSON, TERRY, * STEADMAN, and SCHWELB, *Associate Judges.*

ORDER

[Filed Jan. 18, 1989]

On consideration of appellants' petition in no. 85-543 for rehearing en banc, and the responses thereto; and it appearing that the majority of the judges of this court has not voted to grant the petition for rehearing en banc, it is

ORDERED that the petition in no. 85-543 for rehearing en banc is denied.

On consideration of the joint petition of appellees and amici curiae in nos. 85-577, 86-100, 86-125, 86-185, and 86-257 for rehearing or rehearing en banc, and the responses thereto, it is

ORDERED by the merits division * that the joint petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition in nos. 85-577, 86-100, 86-125, 86-185, and 86-257 for rehearing en banc is denied.

PER CURIAM

Chief Judge Rogers and Associate Judges Mack, Newman, and Schwelb would grant rehearing en banc in no. 85-543.

Associate Judges Terry and Schwelb would grant rehearing en banc in nos. 85-577, 86-100, 86-125, 86-185, and 86-257.

Copies to:

Honorable Samuel B. Block

Honorable Susan R. Winfield

Honorable Gladys Kessler

Honorable Frederick H. Weisberg

Honorable Curtis E. von Kann

Clerk, Superior Court

Wayne M. Mansulla, Esquire
2000 L Street, N.W., Suite 700
Washington, D.C. 20036

Christopher K. Speed, Esquire
5549 Lee Highway
Arlington, VA 22207

James M. Heffler, Esquire
777 14th Street, N.W., Suite 600
Washington, D.C. 20005

Vincent H. Cohen, Esquire
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Margaret Farthing, Esquire
255 North Washington Street, Suite 505
Rockville, MD 20850

Charles L. Reischel, Esquire
Deputy Corporation Counsel

Patrick M. Regan, Esquire
Mark J. Brice, Esquire
2020 K Street, N.W., Suite 840
Washington, D.C. 20006

Robert P. Enderle, Esquire
4301 Garden City Drive, Suite 101
Landover, MD 20785

James C. Gregg, Esquire
1625 I Street, N.W., Suite 300
Washington, D.C. 20006

Joseph P. Dyer, Esquire
10521 Judicial Drive, Suite 300
Fairfax, VA 22030

Geoffrey S. Gavett, Esquire
751 Rockville Pike, Suite 15A
Rockville, MD 20852

Edwin A. Sheridan, Esquire
8408 Arlington Boulevard, Suite 200
Fairfax, VA 22031

Walter A. Smith, Jr., Esquire
555 13th Street, N.W.
Washington, D.C. 20004

APPENDIX G

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellants,

v.

CONSTRUCTION GENERAL INC., *et al.*,
Appellees.

CA126-81

Before: ROGERS, *Chief Judge*; MACK, NEWMAN, FERREN, BELSON, TERRY, STEADMAN, and SCHWELB, *Associate Judges.*

ORDER

[Filed Mar. 24, 1989]

On consideration of appellants' motion to reconsider the en banc order of January 18, 1989, it is

ORDERED that the motion is denied.

PER CURIAM

Chief Judge Rogers and Associate Judge Mack would grant the motion to reconsider.

Copies to:

Honorable Samuel B. Block

Clerk, Superior Court

William C. Burgy, Esquire
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036

James M. Heffler, Esquire
777 14th Street, N.W.
Suite 600
Washington, D.C. 20005

Ignacio Britto Pessoa, Esquire
5549 Lee Highway
Arlington, VA 22207

Vincent H. Cohen, Esquire
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Charles L. Reischel, Esquire
Deputy Corporation Counsel

Margaret D. Farthing, Esquire
12701 Fair Lakes Circle
Suite 470
Fairfax, VA 22033

APPENDIX H

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellants,

v.

CONSTRUCTION GENERAL, INC., *et al.*,
Appellees.

Appeal from the Superior Court of the
District of Columbia
(Hon. Samuel B. Block, Trial Judge)

(Argued March 5, 1986
Reargued April 20, 1987 Decided July 18, 1988)

Peter J. Vangsnes (counsel for argument on March 5, 1986), and *Wayne M. Mansulla* (counsel for argument on April 20, 1987), with whom *Wayne C. Burgy* and *Karl N. Marshall* were on the briefs, for appellants.

Ignacio B. Pessoa (counsel for argument on March 5, 1986), with whom *Christopher K. Speed* and *James M. Heffler* were on the briefs, for appellees.

Walter A. Smith, Jr. (counsel for argument on March 5, 1986 and for reargument on April 20, 1987), with whom *Vincent H. Cohen, Robert B. Cave* and *David F. Grady* were on the briefs, for amicus curiae Washington Metropolitan Area Transit Authority.

Edward E. Schwab, Assistant Corporation Counsel, with whom *John H. Suda*, Acting Corporation Counsel

at the time the briefs were filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the briefs, for the District of Columbia.

Before MACK, FERREN, and STEADMAN,* *Associate Judges.*

Opinion for the court by *Associate Judge* FERREN.

Dissenting opinion by *Associate Judge* MACK at [App. 57a].

FERREN, *Associate Judge*: Samuel Estep was injured in 1979 while working for Krick Commercial, Inc. He received compensation from Krick under the District of Columbia Workmen's Compensation Act of 1928, D.C. Code § 36-501 (1973), which applied to injuries occurring before mid-1982. Estep and his wife then brought a negligence action against the general contractor on the project, Construction General, Inc., which had neither obtained workers compensation insurance for Krick's employees nor paid any part of the compensation to Estep. The trial court granted Construction General's motion for summary judgment, reasoning that, under Supreme Court precedent, the 1928 Act granted Construction General immunity from any tort liability arising from Estep's injury.

This appeal, then, presents the question whether, under the Workmen's Compensation Act of 1928, a general contractor that did not itself obtain compensation for an injured worker is immune from tort liability when the subcontractor that directly employed the worker did meet its statutory obligation to provide compensation.[1] In

---

* HUBERT B. PAIR, *Senior Judge*, was originally a member of this division. JOHN M. STEADMAN, *Associate Judge*, was drawn to replace him pursuant to the Internal Operating Procedures of this court.

[1] In this opinion, we use the term "general contractor" to refer to contractors generally; it therefore includes a subcontractor that hires a sub-subcontractor. Similarly, the term "subcontractor" also includes sub-subcontractors.

DiNicola v. George Hyman Construction Co., 407 A.2d 670 (D.C. 1979), we ruled that such a general contractor is not immune from tort liability. Five years later, however, the Supreme Court ruled in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), that an injured District of Columbia worker cannot sue a general contractor in tort unless both the subcontractor and the general contractor have defaulted on their statutory obligations to provide workers compensation for the injury. Under *DiNicola*, therefore, Construction General would not be immune from tort suits brought by Krick employees such as Samuel Estep. Under *Johnson*, however, Construction General would be immune because its subcontractor, Krick, did not default on Krick's statutory obligation to provide compensation to Estep. The Esteps contend that the rule announced in *Johnson* should not govern injuries covered by the 1928 Act; they argue that we should adhere to the rule of *DiNicola*. We disagree and, on the authority of *Johnson*, affirm the trial court's dismissal of the lawsuit.

I.

In 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act (the Longshore Act) to provide workers compensation for maritime employees. 33 U.S.C. §§ 901 *et seq.* (1982). A year later, Cngress enacted the District of Columbia Workmen's Compensation Act of 1928 (the 1928 Act), which simply made the provisions of the Longshore Act applicable to deaths and injuries befalling workers employed in the District of Columbia. D.C. Code § 36-501 (1973). The 1928 Act has no substantive provisions of its own; it merely incorporates the provisions of the Longshore Act "including all amendments that may hereafter be made thereto." *Id.*

The Council of the District of Columbia has since repealed the 1928 Act and replaced it with the District of

Columbia Workers' Compensation Act of 1980 (the 1980 Act), which, for reasons not relevant here, did not take effect until July 24, 1982. D.C. Code §§ 36-301 *et seq.* (1981); *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134, 1141 (D.C. 1985) (as amended), *cert. denied*, 475 U.S. 1066 (1986). Subsequently, Congress amended the Longshore Act in the Longshore and Harbor Workers' Compensation Act Amendments of 1984 (the 1984 Amendments). Among these amendments were provisions designed to overrule the Supreme Court's interpretation in *Johnson* of the provisions of the Longshore Act at issue (by way of the 1928 Act) in this case. 33 U.S.C. §§ 904 & 905 (Supp. III 1985). In *O'Connell*, however, we held that the 1984 Amendments had no effect on District of Columbia law because the 1928 Act, to which they would have applied, no longer existed.

More specifically, we concluded that when the 1980 Act repealed the 1928 Act, all claims for injuries occurring before the effective date of the new act, July 24, 1982, were cognizable not under the 1928 Act itself, but under the *terms* of the 1928 Act by way of 1 U.S.C. § 109 (1982), "a savings statute enacted by Congress to deal with the legal effect to be accorded a repealed statute." *O'Connell*, 495 A.2d at 1141.[2] As a consequence,

---

[2] In *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985) (as amended), *cert. denied*, 475 U.S. 1066 (1986), which this division is bound to follow, *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971), this court did not directly discuss what law the Council of the District of Columbia intended to apply to pre-1980 Act claims once the 1928 Act had been repealed and the 1980 Act had become effective. Theoretically, the Council could have intended to repeal the 1928 Act only as to claims accruing on or after July 24, 1982, leaving the 1928 Act, as such, including judicial interpretations thereof and congressional amendments thereto, in effect for all claims accruing before the effective date of repeal. This court in *O'Connell*, however, concluded that the Council instead absolutely repealed the 1928 Act effective July 24, 1982, leaving nothing in its place for earlier claims except the federal savings statute, 1 U.S.C. § 109 (1982). In reaching this conclusion, we did not make clear

for purposes of litigating such pre-1982 claims, the federal savings statute incorporated and thus froze the terms of the 1928 Act in the form they had immediately before the 1980 Act's effective date of repeal. It followed that, because the 1928 Act as such no longer existed as of July 24, 1982, there no longer was a District of Columbia statute to which congressional amendment of the Longshore Act could apply. *Id.* at 1140-42; *accord, Keener v. Washington Metropolitan Area Transit Authority*, 255 U.S. App. D.C. 148, 800 F.2d 1173 (1986) (deferring to this court's decision in *O'Connell*), *cert. denied*, 107 S. Ct. 1375 (1987). Whatever power Congress may have had to resurrect the 1928 Act solely for purposes of applying the 1984 Amendments to the District of Columbia, *O'Connell* must be understood to say that Congress did not do so.

In sum, Estep's claim is governed not by the 1928 Act but by the terms of the 1928 Act preserved through the federal savings statute. Accordingly, Estep's claim is governed by the provisions of the Longshore Act as they existed before the 1984 Amendments, since repeal of the 1928 Act itself eliminated the statutory basis for incorporating later amendments to the Longshore Act into District of Columbia law.

II.

Section 4 (a) of the Longshore Act requires employers to obtain compensation for injured employees. 33 U.S.C.

---

whether this result was the Council's intent or instead was dictated by Congress, irrespective of the Council's intent, as the law that applies whenever a congressionally-enacted statute of purely local application in the District of Columbia is repealed. In any event, *O'Connell*, in applying to pre-1980 Act claims the terms of the 1928 Act through the federal savings statute, rather than applying the 1928 Act as such, resolved an ambiguity in two earlier opinions that simply said the 1928 Act applied to claims accruing before the effective date of the new act. *See Garrett v. Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983); *Carey v. Crane Service Co., Inc.*, 457 A.2d 1102, 1103 n.2 (D.C. 1983).

§ 904 (a) (1982). In exchange for undertaking this obligation, employers receive immunity under § 5 (a) from tort suits by injured employees. 33 U.S.C. § 905 (a) (1982). "In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries. For the employer, the reward for securing compensation is immunity from employee tort suits." *Johnson*, 467 U.S. at 931. It follows that an employer who defaults on the obligation to provide compensation does not receive such immunity. 33 U.S.C. § 905 (a) (1982).

The situation of general contractors, however, presents a special problem. Section 4 (a) specifically requires a general contractor to obtain compensation for employees of its subcontractor only if the subcontractor has failed to do so. Thus, a general contractor that fails to obtain compensation does not default on its statutory obligations unless the subcontractor also has failed to obtain compensation. 33 U.S.C. § 904 (a) (1982). The 1928 Act did not make clear, however, whether such a non-defaulting general contractor enjoys the same immunity from tort suits that a non-defaulting employer generally enjoys, even though the general contractor has not itself obtained compensation or insurance for its subcontractor's employees.

In *DiNicola*, we held that under the 1928 Act a general contractor can be sued for its negligence when the subcontractor has paid the injured employee as the workers compensation scheme demands. According to *DiNicola*, the general contractor enjoys tort immunity only when the subcontractor has failed to obtain adequate insurance and the general contractor then meets its resulting duty to step in to pay workers compensation. In reaching this result, the *DiNicola* court interpreted the relevant provisions of the federal Longshore Act; as have other decisions of this court, the *DiNicola* opinion consistently

characterized its reasoning as a construction of federal law and drew upon federal court precedents interpreting the Longshore Act. *See DiNicola*, 407 A.2d at 672, 674-75; *see also Lee v. District of Columbia Department of Employment Services*, 509 A.2d 100, 103 (D.C. 1986); *Milligan v. Brian Construction Development Co.*, 485 A.2d 593 (D.C. 1984); *Dodson v. Washington Automotive Co.*, 461 A.2d 1020 (D.C. 1983) (per curiam).

Several years later, the Supreme Court squarely rejected *DiNicola*'s understanding of §§ 4 (a) and 5 (a) of the Longshore Act, as incorporated in the 1928 Act. In *Johnson*, the Court held that general contractors share the presumption of immunity enjoyed by all employers. Like other employers, a general contractor loses this immunity only if it defaults on its statutory obligations. *Johnson*, 467 U.S. at 937. But, because a general contractor has no obligation to its subcontractor's employees unless the subcontractor has defaulted, the general contractor cannot default under the statute as long as the subcontractor provides compensation. The general contractor, therefore, loses its immunity only when both the subcontractor and the general contractor have failed to pay workers compensation. It is only the general contractor's failure to step in after the subcontractor has defaulted that removes the general contractor's tort immunity. *Id.* at 938-40.

The *Johnson* case arose from injuries suffered by employees of subcontractors working for the Washington Metropolitan Area Transit Authority (WMATA) as general contractor. The employees were covered by the 1928 Act, not directly by the federal Longshore Act. Their suits against WMATA, therefore, were brought under the 1928 Act, and any resolution of their complaints necessarily constituted a construction of the 1928 Act. *Johnson* accordingly interpreted §§ 4 (a) and 5 (a) of the Longshore Act as incorporated into the 1928 Act, the

same District of Columbia law at issue in *DiNicola* and in the present case. *See Johnson*, 467 U.S. at 927-28 & n.4.

Like this court in *DiNicola*, the Supreme Court in *Johnson* reached its view of the 1928 Act through an interpretation of the Longshore Act. Both the Supreme Court in *Johnson* and this court in *DiNicola*, therefore, drew no distinction between the 1928 Act and the Longshore Act; both courts assumed that a correct interpretation of §§ 4 (a) and 5 (a) of the Longshore Act constituted a correct interpretation of the 1928 Act. But that is where the similarity ends. *Johnson* and *DiNicola* adjudicated the same issue with respect to the same statute and reached absolutely conflicting results. The question, then, is which decision binds us now.

III.

The 1928 Act was enacted by Congress but affects only the District of Columbia. "Acts of Congress affecting only the District, like other federal laws," fall within the Supreme Court's Article III jurisdiction. *Whalen v. United States*, 445 U.S. 684, 687 (1980). The Supreme Court has the power to review "decisions of the District of Columbia Court of Appeals interpreting those Acts" and may reject decisions of this court interpreting local laws passed by Congress. *Id.* Accordingly, in *Johnson* the Supreme Court acted entirely within its authority in deciding for itself the question of contractor liability under the 1928 Act, despite the existence of a local Court of Appeals decision reaching the contrary result. The Esteps argue that we may, nonetheless, decline to enforce the Supreme Court's construction because *Johnson* failed to give the deference to the District of Columbia Court of Appeals that the Court's own precedents demand.

A.

Although the Supreme Court has the power to exercise plenary review over questions raised by Acts of Congress

touching only the District of Columbia, it has chosen to treat decisions of this court on questions of local law "in a manner similar to the way in which [it] treat[s] decisions of the highest court of a State on questions of state law." *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974) (footnote omitted). The Supreme Court has stated that it will not overrule the District of Columbia courts on matters of local law " 'save in exceptional situations where egregious error has been committed.' " *Id.* at 369 (quoting *Fisher v. United States*, 328 U.S. 463, 476 (1946)).

The Esteps point out, however, that the *Johnson* opinion betrays no such deference to our decision in *DiNicola*.[3] Nor does *Johnson* even mention the doctrine of deference to the local District of Columbia courts. Had it treated the 1928 Act as a local law, contend the Esteps, the Supreme Court presumably would have deferred to our decision in *DiNicola*, not overruled it. (Perhaps even more likely, they say, the Court might not have addressed the issue at all in a case arising under the local law of the District rather than under the Longshore Act itself.) In any event, the Esteps argue we may ignore *Johnson* because the Supreme Court erred, according to its own doctrine, by failing to defer. They would have us treat *Johnson* as a state court may treat the

---

[3] Indeed, *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), cites *DiNicola* only as one of the majority of cases that have "concluded that § 5(a)'s tort immunity can extend to general contractors, at least when the contractor has fulfilled its responsibilities to secure compensation for subcontractor employees in accordance with the requirements of § 4(a)." 467 U.S. at 933-34 (citing *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670, 674 (D.C. 1979)); *cf. DiNicola*, 407 A.2d at 674 (approving prior cases "concluding that a land-based general contractor is liable as a third party for his negligence"). *Johnson*, therefore, does not even mention that this court had interpreted the local law directly at issue and had held general contractors not immune unless they did in fact obtain compensation for the injured employees of their subcontractors.

rare examples of Supreme Court interpretation of state law that rest on neither a federal statute nor on the federal constitution: just as a state court may ignore a Supreme Court construction purely of state law, this court may ignore the *Johnson* Court's non-deferential construction of local law. *See Owen J. Jones & Son, Inc. v. Gospodinovic*, 46 Or. App. 101, ——, 610 P.2d 1238, 1241 (1980) (en banc) ("A construction of an Oregon statute by the United States Supreme Court is instructive, but not necessarily controlling."); *American Radiator & Standard Sanitary Corp. v. Mark Engineering Co.*, 230 Md. 584, ——, 187 A.2d 864, 866 (1963) (same).

The view that Supreme Court rulings on state law cannot bind the state's own courts is justified because "Supreme Court decision of state law questions for the future"—rather than solely for a specific case at hand—"would be such startingly bad federalism that it could easily be called unconstitutional." 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4021 at 680 (1977) (footnote omitted). Because the District, however, is not a state, Supreme Court interference with the courts of the District cannot raise legitimate objections grounded purely on concerns about federalism. Moreover, although Congress has directed that District of Columbia courts have great autonomy in the application of local laws—and the Supreme Court itself has embraced this principle—the Court has held only that it will treat decisions of this court "in a manner similar" to its treatment of state court decisions on state law. *Pernell*, 416 U.S. at 368. The principle that a state may ignore Supreme Court rulings on state law, therefore, has no direct application to the relation between the Supreme Court and the District of Columbia courts. Whether there are circumstances in which we may nonetheless decline to follow a Supreme Court decision construing a local law adopted by the Congress, however, is a question we need not decide. Nor, of course, is a matter of local law adopted by

the Council of the District of Columbia before us. *See Meiggs v. Associated Builders*, Nos. 85-577 *et al.*, (D.C. July 18, 1988). Whatever merit the Esteps' argument might have in another context, we conclude it does not apply here, for, as elaborated below, in construing the 1928 Act of Congress, the Supreme Court implicitly concluded that deference to this court was "inappropriate with respect to the statute[] involved." *Whalen*, 445 U.S. at 688.

B.

The Supreme Court has stated that the doctrine of deference to the District of Columbia courts on matters of local law does not apply when a question of general federal law "cannot be separated" from the question of local law. *Whalen*, 445 U.S. at 688.[4] We believe *Johnson*

[4] The opinion for the Court in *Whalen v. United States*, 445 U.S. 684 (1980), does not make entirely clear the relevant sense in which the construction of the local law in that case was inseparable from the federal law. The *Whalen* Court set out to determine whether, in enacting the local District of Columbia criminal law, Congress intended to allow the local courts to impose separate, consecutive sentences for rape and killing during the commission of a rape. This was a question of construing purely local law, seemingly an issue for which deference to this court was due. The Supreme Court, however, found a nexus between local and federal law in the fact that, if Congress had not intended to allow consecutive sentences, then the local courts had violated the double jeopardy clause of the fifth amendment by giving Whalen consecutive sentences for rape and first degree murder. The Court believed this nexus was sufficient to remove the case from those in which deference is due, though not absolute. But the question whether Congress intended to allow multiple sentences was logically independent of the fifth amendment bar on courts imposing multiple sentences unless authorized by Congress; thus, *Whalen* was not a case where local and federal questions were bound together because resolution of the local question depended upon resolution of the federal question. It is difficult to understand why deference was not due on the independent issue of statutory construction. The concurring opinions of Justices White and Blackmun may provide a more solid ground for the Court's decision to reverse this court's view of congressional intent in *Whalen*. In their view, the local court was owed initial deference but had made the kind of "egregious error" that

embodies the premise that, because the 1928 Act merely incorporates the provisions of the Longshore Act, construction of the 1928 Act "cannot be separated" from construction of the Longshore Act, and thus Congress intended the construction of the local law and the federal law to be identical.

The *Johnson* Court was aware that the controversy in that case had arisen within the District of Columbia and that the employees had received workers compensation under the 1928 Act rather than directly under the Longshore Act. *See Johnson*, 467 U.S. at 927-28 & n.4. The Court nonetheless refers throughout only to the provisions of the Longshore Act and characterizes its holding as an interpretation of the Longshore Act controlling all future applications of the federal law. The form of the decision, then, is consistent with the premise that the meaning of relevant provisions of the 1928 Act is identical to the meaning of the same terms viewed solely as provisions of the Longshore Act. Because the 1928 Act falls within the Supreme Court's Article III jurisdiction, it is entirely within the Supreme Court's power to interpret the local law as a pure incorporation of the federal law and, therefore, as identical in meaning to the federal Act. In applying this view of the local law (as identical to the federal statute) the Supreme Court did not act contrary to any decision of this court. As noted above, our decisions in *DiNicola* and other cases at least implicitly have taken precisely the same approach. Indeed, in *Dodson*, we expressly said that the Supreme Court's interpretation of the 1928 Act provisions at issue in that case was binding on this court. *See Dodson*, 461 A.2d at 1024 (following *Rodriguez v. Compass Shipping Co.*,

---

justified the Supreme Court in overriding this court's interpretation of the Act of Congress in question. *See Whalen*, 445 U.S. at 695-96 (White, J., concurring), 696 (Blackmun, J., concurring).

Ltd., 451 U.S. 596 (1981), in construing D.C. Code § 36-501 (1973)).[5]

We believe the *Johnson* and *DiNicola* courts' understanding of the relation between the 1928 Act and the Longshore Act is fully justified, at least with respect to provisions, such as those governing general contractor liability, that apply equally to the contexts of land-based and maritime employment. The two laws were passed by the same Congress. More strikingly, the text of the 1928 Act does not track or imitate the terms of the Longshore Act but expressly states the Longshore Act, as such, shall apply as the District of Columbia's workers compensa-

---

[5] The treatment here accorded the 1928 Act is entirely consistent with the view that it is a "local law" and that the United States Courts of Appeal for the lower federal courts continue to owe deference to this court in interpreting that law. The United States Court of Appeals for the District of Columbia Circuit has developed a practice of treating local interpretations of local law exactly as, under the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), federal courts in the states treat state court interpretations of state law. *Hall v. C & P Telephone Co.*, 253 U.S. App. D.C. 368, 370-71, 793 F.2d 1354, 1356-57 (1986), *reh'g denied*, 258 U.S. App. D.C. 83, 809 F.2d 924 (1987). The Circuit Court has applied this doctrine to construction of the 1928 Act. *Id.* at 1355-59; *Keener v. Washington Metropolitan Area Transit Authority*, 255 U.S. App. D.C. 148, 152-53, 800 F.2d 1173, 1177-78 (1986), *cert. denied*, 107 S. Ct. 1375 (1987). (The Circuit Court in *Johnson*, contrary to current practice, did not expressly defer to *DiNicola*. *See Johnson v. Bechtel Associates Professional Corp.*, 230 U.S. App. D.C. 297, 303-06, 717 F.2d 574, 580-83 (1983), *rev'd on other grounds, Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984).) This deference by the Circuit Court is called for even where the Supreme Court has decided deference on its own part is not appropriate. Just as the Supreme Court is the third and last forum after the Superior Court and this court, the Supreme Court is the final forum after the federal District Court and Circuit Court of Appeals, comprising a system distinct from but parallel to the local court system. The Supreme Court, therefore, may properly construe local law in contradiction to a holding of this court, whereas the federal District and Circuit Courts ought not to do so out of respect for this court's primary role in construing District of Columbia law.

tion law. The full text of the 1928 Act (aside from a provision stating exceptions not relevant here) consists of a single sentence stating that "[t]he provisions of [the Longshore Act], including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia"—with appropriate broadening of the terms "employer" and "employee" to extend beyond maritime occupations. D.C. Code § 36-501 (1973). Congress suggested no intention to differentiate between the substantive compensation schemes of the local and federal laws; it provided instead that all amendments to the federal law would become part of the local law. The manner in which Congress wrote the 1928 Act, therefore, indicates its intention that the two laws be substantively the same. From this we infer that an authoritative judicial interpretation of the Longshore Act should generally control the meaning of the 1928 Act.

The *Johnson* and *DiNicola* courts, therefore, correctly assumed that to construe the 1928 Act is to construe the Longshore Act, and vice versa. This conclusion does not preclude the possibility that, in some circumstances, the two Acts may diverge. A court construing the 1928 Act may find good reason to give the local law a gloss different from an interpretation appropriate to the federal law, for the two Acts cover different kinds of employment that may justify different treatment of specific problems. *Cf. Gudmundson v. Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 521 (1942) (declining to apply *Crowell v. Benson*, 285 U.S. 22 (1932), which construed the Longshore Act, to a 1928 Act case because *Crowell* concerned constitutional limits on the admiralty power of Congress not relevant to congressional power over the District of Columbia); *Director, Office of Workers' Compensation Programs, United States Department of Labor v. National Van Lines, Inc.*, 198 U.S. App. D.C. 239, 243 n.20, 613

F.2d 972, 978 n.20 (1979) (United States Court of Appeals for the District of Columbia Circuit has broader territorial jurisdiction over 1928 Act claims than over Longshore Act claims), *cert. denied*, 448 U.S. 907 (1980); *see also Hall v. C & P Telephone Co.*, 253 U.S. App. D.C. 368, 372-73, 793 F.2d 1354, 1358-59 (1986). Here, however, we see no reason to believe the nature of claims arising under the 1928 Act rationally demands a different treatment of general contractor liability from the treatment accorded under the Longshore Act. Accordingly, *Johnson*, not *DiNicola*, controls.[6]

Affirmed.

---

[6] Basically, the dissent says that *DiNicola*, not *Johnson*, should control because the Supreme Court "simply failed to recognize that *Johnson* involved 'an issue of local law' . . . . [T]he Supreme Court in *Johnson* did not interpret the local act." *Post* at 25, 31. We are unwilling to end-run the Supreme Court on that basis; *Johnson* squarely presented, and necessarily decided, the 1928 Act issue.

MACK, *Associate Judge*, dissenting: In 1970, Congress undertook a radical reorganization of the court system of the District of Columbia. It created an autonomous local judicial system and announced that from then on "[t]he highest court of the District of Columbia is the District of Columbia Court of Appeals." [1] In the years that have followed, this court, by virtue of the Court Reorganization Act, as reinforced by the Home Rule Act,[2] has been thrust in the role of the final expositor of District of Columbia law. *See Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979); *Reichman v. Franklin Simon Corp.*, 392 A.2d 9 (D.C. 1978).[3]

Today the majority of the "highest court of the District of Columbia" reaches a remarkable conclusion. It decides that this court is prohibited from following its own prior interpretation of the District of Columbia Workmen's Compensation Act of 1928 (hereinafter "DCWA" or "1928 Act").[4] *See DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979). This is because, reasons the majority, the Supreme Court, some five years after *DiNicola*, reached a "conflicting" result in interpreting the Longshore and Harbor Workers' Compensation Act of 1927 (hereinafter "LHWCA" or "1927

---

[1] District of Columbia Court Reorganization Act of 1970, D.C. Code § 11-102 (1981); *see generally* Pub. L. No. 91-358, 84 Stat. 473 ("Court Reorganization Act") (codified at scattered sections of the D.C. Code and U.S.C.).

[2] District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (codified at scattered sections of the D.C. Code).

[3] *See also* D.C. Code § 11-723 (1987 Supp.) (D.C. Court of Appeals may answer questions certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any state).

[4] 45 Stat. 600, ch. 12 (codified as amended at D.C. Code §§ 36-501 to -502 (1973)).

Act")[5] in ruling upon facts arising in the District of Columbia. *See Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984).

The majority recognizes that the Supreme Court of the United States "has chosen" to treat decisions of the District of Columbia Court of Appeals on questions of local law "in a manner similar to the way in which [it] treat[s] decisions of the highest court of a State on questions of state law." Majority opinion at 9 (citing *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974) (footnote omitted)). Uneasy, no doubt, with the appellants' argument that the Supreme Court in *Johnson* erred in not following its principle of deference, the majority volunteers its own rationale: *Johnson*, says the majority, "squarely rejected" *DiNicola* because deference to *DiNicola* would have been "inappropriate"—on the surface an interesting conclusion since *Johnson* says nothing about rejecting *DiNicola*, failing to defer to, or overruling District of Columbia law.[6]

To the majority's credit, its reasoning does not hinge solely upon a knee-jerk reaction to the history of the District of Columbia's hybrid existence. It instead focuses upon isolated language in the case of *Whalen v. United States*, 445 U.S. 684 (1980), to the effect that "[a]cts of Congress affecting only the District, *like other federal laws*, certainly come within [the Supreme] Court's Art. III jurisdiction," *id.* at 687 (emphasis added) and reasons therefrom that the Supreme Court may reject decisions of this court interpreting local laws passed by Congress. To the extent that the "power" of the Supreme Court to review (as opposed to the "appropriateness" of deference) may be relevant to meet the majority's analysis, I need not question the proposition that the Supreme Court is not constitutionally barred

---

[5] 33 U.S.C. §§ 901 to 950 (1982).

[6] The trial court ruled that *Johnson* had "effectively" overruled *DiNicola*.

from reviewing the decisions of the District of Columbia Court of Appeals interpreting acts passed by Congress, in the same sense that the Supreme Court would be barred from reviewing a state court's interpretation of a state statute. *Id.* at 687-88. I feel compelled, nevertheless, not to shirk from suggesting, however delicately, that it is not at all clear that acts of Congress affecting only the District are "laws of the United States" within the meaning of Article III.[7] Congress, in legislating for the District, acts pursuant to its constitutional powers under Art. I, § 8, cl. 17, which grants the Congress the power of "exclusive legislation in all cases" in the District.[8] Congress' federal powers and its powers under

---

[7] Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . ." U.S. Const. art. III, § 1. "The Judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the *Law of the United States* . . . ." *Id.* 2 (emphasis added). In this class of cases, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

As I suggest, it is not clear that congressional acts affecting only the District are "laws of the United States." But even if they are, it may be that the Court Reorganization Act's designation of this court as the "highest court of the District of Columbia," together with Congress' mandate that the District of Columbia Court of Appeal's decisions be treated like those of the highest court of a state, constitute a congressional "exception" or "regulation" under Art. III, § 2.

[8] In legislating for the District of Columbia, Congress acts pursuant to its powers under Art. I, § 8, cl. 17 which grants the Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ." Clause 17 actually grants three types of power to the Congress: first, the power to extend laws of nationwide application to the District; second, the power to protect national interests there; and third, the power to enact state-like local laws governing District residents. There should be little dispute that laws passed pursuant to the first two types of power

clause 17 are "two distinct classes of legislative powers . . . . [Laws passed pursuant to the clause 17 powers] are not laws of the United States." *American Security & Trust Co. v. Rudolph*, 38 App. D.C. 32, 45 (1912).[9] *See O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134, 1140 n.11 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986); *see also Gary v. United States*, 499 A.2d 815, 850 (D.C. 1985) (en banc) (Mack, J., dissenting) (when Congress acts as a national legislature, it is but one actor among three, but when it acts on a local scale, it " 'encompasses the *full* authority of government . . . the Executive and Judicial powers as well as the Legislative' " (emphasis in original)), *cert. denied*, 477 U.S. 906 (1986).

I am entitled to be bold in this respect because the Supreme Court, understandably in decisions over the years,[10] has not been entirely consistent in its jurisdic-

---

are laws of the United States. However, it is not immediately apparent that congressionally passed laws affecting only the District of Columbia "are like other federal laws." This assumes that every law passed by Congress is a law of the United States. For District of Columbia purposes, we cannot equate "federal" and "United States."

[9] The Court of Appeals of the District of Columbia went on to explain that

> Congress is the sole legislative body for the Union, and in a broad sense all of its enactments are laws of the United States. But it has two distinct classes of legislative powers. The general function which it was established to perform is the enactment of laws that operate and govern throughout the United States. By virtue of the cession of the District of Columbia, it became invested with special legislative powers . . . to the full extent possesed by [the ceding states].

American Security, supra, 38 App. D.C. at 45. Laws passed pursuant to these powers are not "laws of the United States . . . ." *Id.*

[10] In *Key v. Doyle*, 434 U.S. 59 (1977), for example, the Supreme Court held that a congressional enactment of purely local application is not "a 'statute of the United States' for [§ 1257(1) jurisdic-

tional treatment of congressional acts affecting only the District. And now, in view of the action of the Congress in transferring matters of purely local concern from the United States courts to the District of Columbia courts, I am reasonably sure that the Supreme Court has no burning desire to be thrown into the role of "the highest court of the District of Columbia." This question, however, can be left for another day, since it is apparent that the majority here, in finding that we are compelled to follow *Johnson*, has construed *Johnson* too rigidly, and has totally misconstrued *Whalen*.

I.

The majority here reads *Whalen* to stand for the proposition that the Supreme Court need not defer to the District of Columbia courts on matters of local law "when a question of *general federal law* 'cannot be separated' from a question of *local law*." Majority opinion at 12 (citing *Whalen, supra*, 445 U.S. at 688 (emphasis added)). On this basis, the majority concludes that since the local act merely incorporates the provisions of the federal act, construction of the 1928 Act cannot be separated from the LHWCA [11] and therefore, the Su-

---

tion] purposes . . . ." *Id.* at 61. In contrast, in *Palmore v. United States*, 411 U.S. 389 (1973), the Court held that where a prisoner sought appeal of his conviction under the D.C. Code as a matter of right (rather than by petition for certiorari), the District of Columbia Code should not be considered a state statute.

[11] Notwithstanding the fact that the DCWCA merely incorporated the federal act, the DCWCA and the LHWCA remain jurisprudentially distinct. The LHWCA was passed pursuant to Congress' admiralty power; the DCWCA, on the other hand, was passed pursuant to its plenary power to govern the District of Columbia. U.S. Const. art. I, § 8, cl. 17; *O'Connell, supra*, 495 A.2d at 1140 n.11. Congress' use of identical language does not alter the local nature of the act. The 1928 Act is a form of "hybrid statute," one which although local in nature borrows the language of a federal statute subject to appropriate modifications. Where hybrid state statutes are involved, interpretation of the underlying federal language does pre-

preme Court in *Johnson* owed no deference to this court's decision in *DiNicola*. In my view, this is an overly expansive reading of *Whalen*—one which completely ignores the constitutional underpinnings of that decision.

In *Whalen*, the petitioner was convicted of rape, and of killing the same victim in the perpetration of rape, and sentenced to separate terms of imprisonment for each conviction. He argued that the sentence for the offense of rape should be vacated since it merged for purposes of punishment with the felony-murder offense. To hold to the contrary, Whalen argued, would be to interpret the District of Columbia statutes so as to impose multiple punishments for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment.[12]

---

sent a federal question which the Supreme Court may answer. However, the highest court of the incorporating state is still free to interpret the state statute in a manner inconsistent with the Supreme Court's interpretation of the underlying federal language. *Standard Oil v. Johnson*, 316 U.S. 481 (1942). *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 107, at 748 (1983) ("where a state statute incorporates federal law by reference, the Supreme Court may review a state court decision as to that statute, pass on the federal question that is incorporated by reference, and remand for the state court to reconsider its interpretation of the statute in light of the Supreme Court's interpretation of the underlying federal law").

Where a hybrid D.C. statute is involved, may the District of Columbia Court of Appeals follow the doctrine of *Standard Oil?* While the majority concludes that this is a question that it need not answer, it notes that principles of federalism do not compel the *Standard Oil* result with respect to the District. This is true. However, Congress has designated this court the "highest court of the District of Columbia." *Standard Oil* thus might be applicable to the District not because of principles of federalism but because of a Congressional decision.

[12] In footnote 4, the majority attempts to disengage the local law question (*i.e.*, the question of statutory construction) in *Whalen* from the constitutional question: "But the question whether Congress intended to allow multiple sentences was logically independent

The Supreme Court, as the majority here correctly points out, noted in *Whalen* that deference is due to the District of Columbia courts "on matters of purely local concern." *Whalen, supra*, 445 U.S. at 687 (citing *Pernell v. Southall Realty, supra*, 416 U.S. at 366). But the majority fails to recognize that the Supreme Court, in declining to extend deference in *Whalen*, found that "petitioner's claim under *the Double Jeopardy Clause* [could not] be separated entirely from a resolution of the question of statutory construction." *Whalen, supra*, 445 U.S. at 688 (emphasis added). Thus, in *Whalen*, the Supreme Court refused to defer to this court's interpretation of local law because *the interpretation of the local law was intertwined with a constitutional question*; the Court did not suggest that deference is inappropriate where a question of local law cannot be separated from a question of general federal law.[13] *Whalen* therefore cannot be used as a vehicle to compel the conclusion that the Supreme

---

of the fifth amendment bar of courts imposing multiple sentences unless authorized by Congress." Majority opinion at 12 n.4. Notwithstanding the merits of this argument, the Supreme Court's decision not to defer was based upon a belief that the constitutional question and the local law question were intertwined: "But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen, supra*, 445 U.S. at 688. At any rate, the Court repeatedly iterated that the local law question was tied up with a constitutional question. Nowhere did the Court suggest that it was declining to defer because the local law question was tied up with a general question of federal law.

[13] I would also note that the *Whalen* standard is not the only one adopted by the Supreme Court with respect to review of District of Columbia Court of Appeals' interpretations of local law. In *Pernell v. Southall Realty, supra*, the Court noted that the Court Reform Act supported its "longstanding practice of not overruling the Courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.'" *Id.* at 369 (citations omitted). The *Johnson* court points to no "egregious error" committed by this court in *DiNicola*.

Court in *Johnson* intended to overrule this court's interpretation of a local law.

II.

Moreover, *Johnson* cannot be read as overruling this court's interpretation of a local law. The language of *Johnson* simply does not say this; in fact, unless it can be said that a printing or typographical error has intervened, *Johnson* cites *DiNicola* as representing the majority view which it is predisposed to follow. More significantly, the question of deference to local law was not briefed or argued. In fact, there is no indication that the *Johnson* Court focused upon the fact that a question of local law was involved. The length to which the majority here strains is apparent in its reasoning—*i.e.* since the Supreme Court was aware that the controversy in *Johnson* had arisen in the District of Columbia and since the Court referred only to the provisions of the Longshore Act, the "*form* of the decision, then, *is consistent with the premise* that the meaning of relevant provisions of the 1928 Act is identical to the meaning of the same terms viewed solely as provisions of the [LHWCA]." Majority opinion at 13 (emphasis added).[14]

It is equally true, however, that the form of the decision is consistent with the premise that the Court simply failed to recognize that *Johnson* involved "an issue of local law." As the majority here correctly explains, *Johnson* arose as a result of injuries suffered by employees of subcontractors working for the Washington Metropolitan

---

[14] It might surprise the Supreme Court to know that, in *Johnson*, it "implicitly concluded that deference to this court was inappropriate" Majority opinion at 12. In this regard, I am reminded of an apt observation by the Supreme Court:

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Webster v. Fall, 266 U.S. 507, 511 (1925) (citations omitted).

Area Transit Authority (WMATA) as general contractor. Metro was a massive construction project which led the general contractor, WMATA, to engage several hundred subcontractors, which in turn engaged over a thousand sub-subcontractors. Although not legally required to do so by the 1928 Act, WMATA purchased a "wrap-up" insurance policy covering the employees of all of its subcontractors. WMATA passed on to the subcontractors the cost of the insurance so that although the subcontractors were technically relieved of their normal statutorily-required insurance payments, they did in effect provide such payments. *See Johnson, supra*, 467 U.S. at 927-30.

The issue in *Johnson* was whether WMATA as general contractor was immune from suit. The Supreme Court, based upon the language of the employer's tort immunity clause in the federal LHWCA held that WMATA was protected from a negligence action by the employee of one of its subcontractors. "[Sections] 4(a) and 5(a) of the LHWCA render a general contractor immune from tort liability provided the contractor has not failed to honor its statutory duty to secure compensation for subcontractor employees when the subcontractor itself has not secured such compensation. So long as general contractors have not defaulted on this statutory obligation to secure back-up compensation for subcontractor employees, they qualify for § 5(a)'s grant of immunity." *Johnson, supra*, 467 U.S. at 939-40.

The *Johnson* Court did not recite that the controlling law in the case was the 1928 D.C. Act; the DCWCA was mentioned only once in a cursory footnote,[15] but then the Court proceeded, without further comment, to interpret the language drawn from the underlying LHWCA. At

---

[15] The Supreme Court in footnote 4, refers to the District of Columbia statute: "District of Columbia Code § 36-501 (1973) incorporates the LHWCA, 33 U.S.C. § 901 *et seq.*, to cover employees 'carrying on any employment in the District of Columbia.'" *Johnson, supra*, 467 U.S. at 928 n.4.

no point did the *Johnson* Court address the possible jurisprudential implications of the DCWCA's status as a local statute.

The *Johnson* Court also gave no indication that it was in fact interpreting the DCWCA by interpreting the identical provisions of the LHWCA. The Court did not discuss the relationship between the 1928 Act and the LHWCA and nowhere did the Court state that "the meaning of relevant provisions of the 1928 Act is [to be] identical to the meanings of the same terms viewed solely as provisions of the [LHWCA]." Majority opinion at 13. In short, the Court in *Johnson* simply did not interpret the 1928 Act.

Perhaps one explanation for the Court's analysis in *Johnson* was the unique overlap of federal and local functions, both administrative and judicial, which until recently existed in the District. For ease of administration, claims for workers' compensation under the DCWCA had been processed by the federal Department of Labor along with those arising under the LHWCA. *See* D.C. Code § 36-503 (1973). Consequently, although it was the application of the DCWCA that was actually at issue in *Johnson*, the petition for review of the compensation order was brought to the United States Court of Appeals for the District of Columbia Circuit, rather than to this court. Given this history, the purely local nature of the governing statute was perhaps somewhat obscured. As a result, the *Johnson* Court did not afford its normal deference to this court because it did not realize that deference was appropriate. The Court viewed the controlling law as the LHWCA not the DCWCA and thus there was no issue of "purely local concern."

III.

Even a strict interpretation of a statutory provision ofttimes cannot be divorced from the spectre of accompanying facts. I believe that this is what inadvertently

happened in *Johnson*; I do not believe that the Supreme Court has interpreted the statutory provisions at issue in the instant case and I do not believe we are constrained by conflicting Supreme Court precedent as a result of *Johnson*.

As to the persuasiveness of the *Johnson* decision in hindsight, I note that the Court initially conceded the existence of an "ambiguity" in the wording of the LHWCA which rendered the scope of immunity for general contractors "unclear." It acknowledged that the immunity language "does not effortlessly embrace" general contractors and that a "slightly strained reading" is required to include them as employers at all. *Johnson*, *supra*, 467 U.S. at 933-34. Indeed, the Court very reluctantly departed from its own admonition that in construing the LHWCA " 'the wisest course is to adhere closely to what Congress has written.' " *Id.* at 934 (citation omitted). Not only was this an admonition, it was a premonition since *Johnson*'s departure from "the wisest course" was quickly repudiated by Congress:

> The Supreme Court in *Washington Metropolitan Area Transit Authority v. Johnson*, [*supra*], changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability and immunity under the Longshoremen's and Harbor Workers' Compensation Act.
>
> * * *
>
> *WMATA* [*v. Johnson*], the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. The case should not have any precedential effect.[16]

Thus, the Congress confirmed that the reasoning and outcome in *Johnson* did not comport with the philosophy

---

[16] H.R. CONF. REP. No. 1027, 98th Cong., 2nd Sess. 24 (1984), *reprinted* in U.S. CODE CONG. & ADMIN. NEWS 2771, 2774.

underlying workers' compensation schemes. I might add that general contractor immunity destroys the *quid pro quo* of workers' compensation. *See Meiggs v. Associated Builders*, No. 85-577, slip op. at 13 (July 18, 1988). Nor does general contractor immunity find support in the argument that it is appropriate since the general contractor bears the cost of the subcontractor employer's insurance policy in the form of an increased subcontract price. Basic principles of economics teach that the general contractor does not bear this increased cost; the general contractor simply passes the cost on to whomever is on the other side of the contract. *DiNicola, supra*, 402 A.2d at 674. To apply "ultimate cost" reasoning to support general contractor liability threatens total abolition of an insured workers' statutorily protected right to sue negligent third parties.

The reasoning of *Johnson* would also eliminate the incentive for the general contractor, or intermediate contractors between the general contractor and the actual employer, to avoid hazardous conditions in the workplace. As this court recognized in *DiNicola*, the object of workers' compensation is not served once insurance has been provided, regardless of who purchased it or whether they were under an obligation to do so. Workers' compensation benefits are limited by statute; they are not designed to compensate for all of the damages suffered by the injured employee.

IV.

Finally, it seems to me that the outcome so tortuously reached by the majority here is patently unfair. Under the federal LHWCA, injured employees are not barred from suing general contractors; Congress amended the LHWCA to overturn *Johnson* almost immediately. Likewise, under the District of Columbia Workers' Compensation Act of 1979,[17] which superseded the 1928 Act,

---

[17] 27 D.C. Reg. 2503, 2507-08 (1980) (as codified at D.C. Code § 36-301 (1981)).

general contractors do not have immunity. *See Meiggs v. Associated Builders, supra,* slip op. at 3. Moreover, if the District of Columbia Council had not passed the 1979 legislation, this issue would not now be before this court. General contractors would not be immune from suit under the federal Act or the local 1928 Act. Congressional amendments to the LHWCA overturning *Johnson* would have applied to the 1928 Act as well. But the District of Columbia Council did pass the 1979 Act repealing the 1928 Act, and so when Congress repudiated *Johnson,* there was no 1928 Act to be amended. *See O'Connell v. Maryland Steel Erectors, Inc., supra.* The majority here accepts the proposition of *O'Connell* that the Congress in 1984 could not have amended an act which no longer existed. Yet it turns to a general savings statute (1 U.S.C. § 109 (1982); July 30, 1947, ch. 388, 61 Stat. 635) to hold that the "terms" of the 1928 Act are preserved as to appellants and that appellants therefore cannot sue WMATA. We are not reminded that the savings statute preserves liabilities "as they then existed" (here in 1982, the date of repeal), *see Keener v. Washington Metropolitan Area Transit Authority,* 255 U.S. App. D.C. 148, 800 F.2d 1173 (1986), *cert. denied,* 107 S.Ct. 1375 (1987), and therefore *before* the Supreme Court's 1984 decision in *Johnson* allegedly interpreting the 1928 Act. There is a certain incongruity in the majority's reasoning that the Congress cannot amend a statute no longer in existence but that the Supreme Court can interpret it. The truth of the matter is that the majority's analysis "creates" a small class of employees who have no judicial redress against general contractors.[18]

---

[18] It is an interesting exercise to note that while we have held that the District of Columbia's legislative branch could effectively repeal the congressional 1928 Act, *see O'Connell, supra,* the majority holds today that we, as the District of Columbia's judicial branch, are required to follow an interpretation of the congressional 1928 Act, one repudiated by the Congress.

It is a little late in the game for the majority to plead that Congress intended the federal act and the local act to be interpreted identically. In the context of time, the majority's decision has the practical effect of reaching exactly the opposite result. Congress has spoken as to the meaning of §§ 4 and 5 of the LHWCA; general contractors do not possess immunity. The majority makes the local act comport not with Congress' understanding of §§ 4 and 5 of the LHWCA but rather with a Supreme Court decision stripped of any "precedential effect."

In short, I am convinced that the Supreme Court in *Johnson* did not interpret the local act. *Johnson* interpreted provisions of the federal act (and that interpretation has been rejected by Congress). If the majority is right, in suggesting that my reasoning constitutes an "end-run," and in holding that *Johnson* squarely presented and necessarily decided the local act, it is puzzling why *Johnson* makes no mention of the repeal of the local act or the savings statute. In my view, therefore, neither *Johnson* nor *Whalen* support the majority's reasoning today that *Johnson* rejected our interpretation of our decision in *DiNicola* as "inappropriate" and that we are prohibited from following *DiNicola*.

For these reasons, I would reverse the grant of summary judgment against the Esteps. I would hold that they might go to trial on their complaint against the general contractor, appellee Construction General, Inc., for negligence resulting in alleged permanent injuries suffered by Samuel Estep.

APPENDIX I

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellant,

v.

CONSTRUCTION GENERAL INCORPORATED, *et al.*
Appellee.

Before: MACK and FERREN, *Associate Judges*, and PAIR, *Senior Judge.*

ORDER

[Filed Mar. 11, 1986]

At oral argument on March 5, 1986, we indicated that supplemental briefing on specific questions would facilitate our further consideration of this case. The parties, having agreed to this proposal, are accordingly

ORDERED to file in this court within thirty (30) days from the date of this Order submissions addressing the following issues:

(1) Whether the decision of the United States Supreme Court in *WMATA v. Johnson*, 104 S.Ct. 2827 (1984), is irreconcilable with the decision of the District of Columbia Court of Appeals in *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979)?

(2) Whether Congress, by enacting the District of Columbia Court Reform and Criminal Procedure Act

of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified as amended at D.C. Code, title 11 (1981 and Supp.1985)), as amended, the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended in scattered sections of D.C. Code (1981 & Supp.1985)), as amended, or both of these Acts, vested the District of Columbia Court of Appeals with jurisdiction on local issues equivalent for all purposes to that of the highest court of a state?

(3) Whether Congress, by enacting the District of Columbia Workmen's Compensation Act of 1928, ch. 612, § 1, 45 Stat. 600 (1928) (codified at D.C. Code §§ 36-501 to -502 (1973)), was acting on a national or federal level or, alternatively, was acting under U.S. Const. art. I, § 8, cl. 17 in a manner which was purely local in purpose and effect?

It is

FURTHER ORDERED that the Clerk's Office shall serve a copy of this Order upon the Corporation Counsel of the District of Columbia to enable that office to respond in whatever manner it deems appropriate.

PER CURIAM.

Copies to:

William C. Burgy, Esquire
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036

James M. Heffler, Esquire
777 - 14th Street, N.W.
Suite 600
Washington, D.C. 20005

Margaret Farthing, Esq.
255 N. Washington Street, Suite 505
P.O. Box 4482
Rockville, MD 20850

Ignacio Britto Pessoa, Esquire
5549 Lee Highway
Arlington, VA 22207

Vincent Cohen, Esquire
815 Conn. Ave., N.W.
Washington, D.C. 20006

Charles L. Reischel, Esquire
Deputy Corporation Counsel

APPENDIX J

RELEVANT STATUTES

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 904 (1982)) provided:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905 (1982)) provided, in part:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all the liability of such employer to the employees, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law . . . on account of such injury or death . . . .

Section 4 of the District of Columbia Workers' Compensation Act of 1979 (D.C. Code Ann. § 36-303 (1981)) provides, in part:

> (b) Every employer subject to this chapter shall be liable for compensation for injury or death without regard to locality of injury or to fault as a cause of the injury or death.
>
> (c) In the case of an employer who is a subcontractor, the contractor shall be liable for and shall

secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

Section 5 of the District of Columbia Workers' Compensation Act of 1979 (D.C. Code Ann. § 36-304 (1981)) provides, in part:

> (a) The liability of an employer prescribed in § 36-303 shall be exclusive and in place of all liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.
>
> (b) The compensation to which an employee is entitled under this chapter shall constitute the employees' exclusive remedy against the employer . . . .

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act as amended by Congress in 1984 (33 U.S.C. § 904 (Supp. IV 1986)) now provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act as amended by Congress in 1984 (33 U.S.C. § 905 (Supp. IV 1986)) now provides, in part:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law . . . on account of such injury or death . . . . For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

Title 28 United States Code § 1257 (1982) provided, in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Title 28 United States Code Annotated § 1257 (Supp. 3 Oct. 1988), effective for judgments entered after September 27, 1988, provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ

of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

No. 88-1692 (2)

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC., *et al.*,
Petitioners,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM H. ALLEN *
STEVEN SEMERARO
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Respondents

JOSEPH H. KOONZ, JR.
PATRICK M. REGAN
MARK J. BRICE
MARC FIEDLER
Koonz, McKenney & Johnson, P.C.
2020 K Street, N.W.
Washington, D.C. 20006
(202) 659-5500
Attorneys for Respondents Meiggs and Frazier

PETER J. VANGSNES
Ashcraft & Gerel
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400
Attorney for Respondents Hobbs

May 1989

* Counsel of Record

1989

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	6
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

	Page
Catlin v. *United States*, 324 U.S. 229 (1945)	7
Cobbledick v. *United States*, 309 U.S. 323 (1940)	9
Cox Broadcasting Co. v. *Cohn*, 420 U.S. 469 (1975)	7, 8
DiNicola v. *George Hyman Constr. Co.*, 407 A.2d 670 (D.C. 1979)	3, 5
District of Columbia v. *Greater Washington Cent. Labor Council*, 442 A.2d 110 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983)	3, 4
Estep v. *Construction General, Inc.*, 546 A.2d 376 (D.C. 1988)	13, 15
Fisher v. *United States*, 328 U.S. 463 (1946)	11
Flynt v. *Ohio*, 451 U.S. 619 (1981)	7, 9
Gillette Co. v. *Miner*, 459 U.S. 86 (1982)	7
Goodyear Atomic Corp. v. *Miller*, 108 S. Ct. 1704 (1988)	8
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	8
Hughes v. *District of Columbia Dep't of Employment Servs.*, 498 A.2d 567 (D.C. 1985)	5
James v. *Appel*, 192 U.S. 129 (1904)	12
Joines v. *Patterson*, 274 U.S. 544 (1927)	12
Key v. *Doyle*, 434 U.S. 59 (1977)	10, 11
Liberty Mut. Ins. Co. v. *Goode Constr. Co.*, 97 F. Supp. 316 (E.D. Va. 1951)	5
Lorillard, Inc. v. *Pons*, 434 U.S. 575 (1978)	12
Mercantile Nat'l Bank v. *Langdeau*, 371 U.S. 555 (1963)	9
Miller's Executors v. *Swann*, 150 U.S. 132 (1893)	13
Mitchell v. *Forsyth*, 472 U.S. 511 (1985)	8, 9
North Dakota State Bd. of Pharmacy v. *Snyder's Drug Stores*, 414 U.S. 156 (1973)	7
O'Dell v. *Espinoza*, 456 U.S. 430 (1982)	7
Parr v. *United States*, 351 U.S. 513 (1956)	9, 10
Pernell v. *Southall Realty*, 416 U.S. 363 (1974)	11
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943)	10
Sexton v. *Dreyfus*, 219 U.S. 339 (1911)	12
Standard Oil Co. v. *Johnson*, 316 U.S. 481 (1942)	13

TABLE OF AUTHORITIES—Continued

Page

Stutsman County v. *Wallace*, 142 U.S. 293 (1892) .. 5
Thomas v. *George Hyman Constr. Co.*, 173 F. Supp. 381 (D.D.C. 1959) 3, 5
Washington Metropolitan Area Transit Authority v. *Johnson*, 467 U.S. 925 (1984) ..... *passim*

UNITED STATES CONSTITUTION

Article III 15

STATUTES

1 U.S.C. § 109 14
28 U.S.C. § 1257 ..... 6, 7, 10
28 U.S.C. § 1291 7
Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. (part 2) 1424, 33 U.S.C. §§ 901 *et seq.*, made applicable to the District of Columbia, 45 Stat. 600, D.C. Code former § 36-501
§ 4, 33 U.S.C. § 904 ..... *passim*
§ 5, 33 U.S.C. § 905 ..... *passim*
Longshore and Harbor Workers' Compensation Act, 44 Stat. (part 2) 1424, as amended, Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1639 (1984)
§ 4, 33 U.S.C. § 904 ..... 4, 11
§ 5, 33 U.S.C. § 905 ..... 4, 11
Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1639
§ 4, 98 Stat. 1641 4
§ 28(a), 98 Stat. 1655 4
District of Columbia Workers' Compensation Act of 1979, D.C. Law 3-77, D.C. Stats. at Large 1979-80, at 377, D.C. Code §§ 36-301 *et seq.*
§ 2, D.C. Code § 36-301 13
§ 4, D.C. Code § 36-303 ..... *passim*
§ 5, D.C. Code § 36-304 ..... *passim*

LEGISLATIVE MATERIAL

H.R. Rep. No. 1027, 98th Cong., 2d Sess. (1984) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC., *et al.*,
Petitioners,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

At issue is the correctness of the District of Columbia Court of Appeals' construction of provisions of a workers compensation statute enacted by the District of Columbia Council for application only in the District of Columbia. The construction differs from this Court's construction of similar provisions of a federal statute that was the District of Columbia workers compensation act until the Council replaced it. This Court's decision was handed down four years after the Council acted and two years after its new local D.C. law took effect. That the case is within the Court's jurisdictional statute at all is dubious; it concerns solely the meaning of a District of Columbia law enacted by the District of Columbia Council. The judgment below is in any event the paradigm of a non-

final judgment outside this Court's jurisdiction; the several cases covered by the petition all go back to the District's superior court for trial. At the very most the only question for this Court is whether the court of appeals was egregiously wrong in its construction of the local statutory provisions, and that is plainly not a cert-worthy question.

The liability of contractors to employees of subcontractors has been a persistent issue in workers compensation law. The question is whether and, if so, under what circumstances a contractor is relieved of tort liability to an injured employee of one of the contractor's subcontractors. In *Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. 925 (1984), this Court attacked the question as it is posed by sections 4 and 5 of the Longshore and Harbor Workers' Compensation Act, the federal statute that governs workers compensation for shore-based maritime workers and, until 1982, was the District of Columbia's workers compensation statute. 44 Stat. (part 2) 1424 (1927), as amended, 33 U.S.C. §§ 901 *et seq.*; made applicable to the District by 45 Stat. 600 (1928), D.C. Code former § 36-501.[1] The Court, dividing 6-3, resolved what it described as "an ambiguity in the wording of these sections," 467 U.S. at 932, with a ruling that a contractor generally was protected from tort liability in a suit by an employee of a subcontractor.

The Court acknowledged that there was disagreement in the lower federal courts and the state courts at both steps of the analysis that led it to this ruling. 467 U.S. at 933, 936-37. The majority of the Court claimed faithfulness "to the plain language of the statute," *id.* at 938, for the second step of its analysis, but the dissent said that the majority had "simply fixed upon what it believes to be good policy and then patched together a rationale

[1] The statute was called the Longshoremen's and Harbor Workers' Compensation Act until amendments in 1984 (p. 4, *infra*) changed its name. 98 Stat. 1654.

as best it could," *id.* at 942, had reached its conclusion "by means of a rather clumsy sleight of hand," *id.* at 943, and had adopted a reading of the statute that was "internally inconsistent," *id.* at 945. The proper resolution of the ambiguity, in short, was one as to which reasonable people could differ.

Several years before this Court's *WMATA* decision, the District of Columbia Court of Appeals, interpreting the same statute, had reached a contrary result, the result advocated by the *WMATA* dissenters. *DiNicola* v. *George Hyman Constr. Co.*, 407 A.2d 670 (D.C. 1979). It held that a contractor was freed of tort liability to the employees of one of its subcontractors only if it stepped into a gap left by the subcontractor's failure to secure workers compensation coverage. That interpretation of sections 4 and 5 accorded, as the court noted, 407 A.2d at 674, with the interpretation placed on those sections and corresponding sections of similar workers compensation statutes by other courts. In particular, it accorded with an earlier decision of the District Court for the District of Columbia when it was the District's trial court of general jurisdiction. *Thomas* v. *George Hyman Constr. Co.*, 173 F. Supp. 381 (D.D.C. 1959).

A few months later, with *DiNicola* fresh on the books, the District of Columbia Council repealed the statute making the Longshore Act applicable to the District and enacted the District of Columbia Workers' Compensation Act of 1979 (actually enacted in 1980). D.C. Code §§ 36-301 *et seq.* The new statute was generally in the pattern of the Longshore Act, though not identical to it (*see* p. 13, *infra*). Its sections 4 and 5 do not differ significantly from those of the federal statute. (The relevant sections of the two statutes can be compared at Pet. App. 74a-75a.) The effectiveness of the local statute was delayed by a lawsuit challenging the Council's power to enact it. After the authority of the Council was sustained, *District of Columbia* v. *Greater Washington Cent. Labor*

Council, 442 A.2d 110 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983), the statute became effective in 1982, applicable to injuries suffered in the course of employment after its effective date.

This Court decided the *WMATA* case two years later. It concerned injuries that had occurred in the District before the new District statute became effective and therefore was governed by the Longshore Act and not the new District law. The *WMATA* interpretation of the Longshore Act, which did not purport to affect the new District law, was promptly overturned as it related to longshore and harbor workers. Congress at the time was considering comprehensive amendments to the Longshore Act. The conference committee wrote and Congress adopted amendments to sections 4 and 5 that overruled *WMATA* and made contractors generally liable to tort actions by employees of subcontractors. It made the amendments applicable to pending actions as well as future ones. Pub. L. 98-426, §§ 4, 28(a), 98 Stat. 1641, 1655 (Pet. App. 75a-76a). The conferees said that they believed that *WMATA* "does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983" and that therefore "[t]he case should not have any precedential effect." H.R. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984).

The cases that are the subject of the petition arose after the effective date of the new local statute and are therefore governed by it and not the Longshore Act. In two of them, the superior court granted a contractor's motion for summary judgment dismissing a tort complaint of a subcontractor's employee. (Pet. App. 18a-22a.) In the third the superior court denied such a motion. (*Id.* at 23a-31a.) The cases were consolidated on appeal. The court of appeals observed initially that the *WMATA* construction of the Longshore Act as that act had applied in the District was not an authoritative, binding construction of the new District of Columbia

compensation act. (Pet. App. 5a-6a.) It then proceeded to resolve the ambiguity in sections 4 and 5 of the new statute "[f]reed of the encumbrances flowing from contradictory judicial interpretations." (*Id.* at 6a.) It concluded that the better reading was that contractors are liable in tort to the employees of their subcontractors except when a subcontractor has defaulted on its workers compensation coverage obligation and the contractor has supplied the deficiency. (*Id.* at 6a-10a.)

The court concluded further that its reading was confirmed by application of the court's rule of construction that, "[w]hen a local provision is borrowed directly from a federal statute, the Council is presumed to have borrowed the judicial construction thereof as well." *Hughes* v. *District of Columbia Dep't of Employment Servs.*, 498 A.2d 567, 571 n.8 (D.C. 1985) (quoted at Pet. App. 11a). When the Council enacted its workers compensation statute, sections 4 and 5 of the Longshore Act, which the Council borrowed, had been construed by the court of appeals in *DiNicola*, by the district court in *Thomas*, and, in an even earlier case, by the District Court for the Eastern District of Virginia, *Liberty Mut. Ins. Co.* v. *Goode Constr. Co.*, 97 F. Supp. 316 (E.D. Va. 1951), to hold a contractor generally liable in tort to subcontractor employees. (Pet. App. 10a-14a.)

As for *WMATA*—apart from the disapproval of the result by Congress and the consequent denial to the decision of "any precedential effect"—the court noted that its rule of construction "applies only to such judicial constructions as have been placed on the 'borrowed' statute *prior* to its enactment by the jurisdiction adopting it." (*Id.* at 11a; emphasis in original.)[2] *WMATA* was a subsequent construction of the statute being borrowed that the Council could not possibly have taken into account when it was doing the borrowing. The court also relied

[2] That commonsense rule is also the rule of this Court. Stutsman County v. Wallace, 142 U.S. 293, 312 (1892).

on specific elements of the legislative history of the Council enactment and on the consistency of what it considered the proper reading of sections 4 and 5 with what it viewed as "the philosophy underlying workers' compensation schemes." (*Id.* at 15a.)

The court held that the subcontractor employees in the several cases before it could sue the contractors for tort damages. It reversed and affirmed the superior court rulings as appropriate and returned all the cases to the superior court for trial on the merits.

ARGUMENT

Seldom has so much been made of so little as in the petition in this case. Petitioners ask this Court to review a classically non-final judgment of a court, directed by Congress to be treated for this Court's jurisdictional purposes as the "highest court of a State," interpreting a statute enacted by its own legislature. The lack of finality means that this Court has no jurisdiction of the case. There are other jurisdictional obstacles. The District of Columbia Council's workers compensation act may not be a "statute of the United States" within this Court's jurisdictional statute, and there is certainly no other federal issue. And, if the Court did have jurisdiction, the only possible question for it would be whether the District of Columbia Court of Appeals was egregiously wrong in interpreting the Council's workers compensation statute as it did. That is neither a substantial question nor a question of any but local importance.

1. This Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. The District of Columbia Court of Appeals is the "highest court of a State" for purposes of this Court's jurisdiction. *Id.* The judgment or decree of the D.C. Court of Appeals in these cases amounts to the denial of

motions to dismiss complaints for legal insufficiency under local law. There has been no judgment or decree adjudicating anyone's liability to anyone else. The motions to dismiss having been denied, the cases in the ordinary course will proceed to jury trials of the defendant contractors' liability to the plaintiff workers. If that is not a non-final judgment, then nothing in this Court's jurisprudence is.

But, of course, it is a non-final judgment. In *Catlin* v. *United States*, 324 U.S. 229 (1945), the Court, applying what is now 28 U.S.C. § 1291 limiting appeals to the courts of appeals to final decisions of the district courts, said that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *id.* at 233, and that the "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable," *id.* at 236. The policy demanding finality under Section 1257 is stronger even than that underlying Section 1291, since it rests not just on avoiding piecemeal review but also on minimizing "federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). And so, in general, when the effect of the judgment of the highest court of a state is to send a case back for trial, this Court has no jurisdiction to review that judgment, however momentous the issue the state court has decided. *Flynt* v. *Ohio*, 451 U.S. 619 (1981) (per curiam).[3]

There are, to be sure, some state-court judgments that leave more to be done than their execution that are nevertheless treated as final under Section 1257. The cases were categorized in *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469 (1975). Petitioners seemingly would place their

---

[3] *See also* Gillette Co. v. Miner, 459 U.S. 86 (1982) (per curiam); O'Dell v. Espinoza, 456 U.S. 430 (1982) (per curiam).

case in the fourth of the *Cox Broadcasting* categories (none of the other three is even colorably relevant): cases in which resolution of the federal issue in favor of the petitioner or appellant would end the controversy and "a refusal immediately to review the state-court decision might seriously erode federal policy." 420 U.S. at 483; *see id.* at 482-87. Petitioners cite *Goodyear Atomic Corp.* v. *Miller*, 108 S. Ct. 1704 (1988) (Pet. 1), where the Court placed in that category a decision of the Ohio Supreme Court that the Atomic Energy Act did not preempt the state's power to apply safety standards beyond those of federal law. The Court undertook immediate review, even though there would be further workers compensation proceedings, because "the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production." 108 S. Ct. at 1709. Petitioners' implied claim of equivalency of the Atomic Energy Act and the District of Columbia Workers' Compensation Act is breathtaking in its audacity—but wanting in good sense.

Petitioners cite two other cases for their assertion that the judgment below is final. They are equally far afield. Petitioners' reliance on one of them is a play on words. In *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the Court held that a public official could appeal at once to a court of appeals from a district-court judgment denying his claim of common-law qualified immunity from a suit seeking damages for violation of a constitutional right. The case stands in the line of *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982), holding that public officials, whose immunity ensures that they are not inhibited in the performance of their public duties, must be immune from suit as well as from liability to achieve that assurance. 472 U.S. at 525. The petitioner contractors claim to be "immune" from liability in tort to the employees of their subcontractors, but all they mean by that is that, if they were right on the law, they would ordinarily have a defense to a negligence action by such an employee.

Claimed "immunity" of that sort is quite a different immunity from that of public officials.

Petitioners' final citation, of *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963), is mystifying (except perhaps as another attempt to ride the word "immune"; the Court mentioned that the petitioner had claimed that it was "immune from suit" in the Texas court where it had been sued, 371 U.S. at 556). In that case, the Texas Supreme Court's reading of the national bank venue statute permitted trial of an action against national banks in a state court in one county instead of requiring trial in another county. If the Texas court's interpretation of the federal statute was incorrect and review was delayed until after the trial in the wrong court, there might have to be two trials. This Court therefore undertook to review immediately the Texas court's interpretation of the federal bank venue statute. 371 U.S. at 558. The case was later explained as one in which a state court had rejected "a party's federal-law claim that he [was] not subject to suit before a particular tribunal." *Mitchell* v. *Forsyth*, 472 U.S. at 525 n.8. Petitioners, by contrast, make a local-law claim they are not liable in any court to employees of their subcontractors. They make no independent federal-law claim at all, much less one that they are not "subject to suit before a particular tribunal."

If *Langdeau* were taken to mean that the threat of an unnecessary trial makes any judgment final, the result would be the very swallowing of the rule of finality by an exception that the Court cautioned against in *Flynt*. 451 U.S. at 622. But unless it means that, it has nothing to do with petitioners' case. There is nothing unusual about the trials they face. The hardship of a trial is certainly "one of the painful obligations of citizenship," *Parr* v. *United States*, 351 U.S. 513, 520 (1956), quoting *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940), but it "is one . . . Congress contemplated" in establishing

and maintaining the final judgment rule, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). In cases such as this one where remand for trial will not infringe any federal policy, the inconvenience and cost of requiring the petitioner "to hazard a trial," *Parr*, 351 U.S. at 519, has never been held sufficient to confer jurisdiction on this Court to review an otherwise non-final judgment.

2. Petitioners acknowledge a doubt whether their case would be covered by Section 1257 even if the judgment were final. In *Key* v. *Doyle*, 434 U.S. 59 (1977), the Court held that a provision of the District of Columbia Code enacted by Congress was not a "statute of the United States" within the meaning of old Section 1257(1). Thus, a case in which the D.C. Court of Appeals had sustained a constitutional challenge to a provision of the D.C. Code was not within the Court's jurisdiction on appeal. As dissenting Justices pointed out, the Court's ruling made it uncertain whether a D.C. Code provision could be a statute of the United States whose interpretation by the D.C. Court of Appeals would be within the Court's certiorari jurisdiction under old Section 1257(3), now Section 1257(a). 434 U.S. at 74 n.6.

The uncertainty is the greater in this case because this case involves solely the interpretation of provisions of the D.C. Code enacted by the D.C. Council—not by Congress. There is no issue of constitutional law or of national statutory law. The Council acts by delegation from Congress, true enough. But that fact does not answer the question whether petitioners, who assert merely that the local District of Columbia court misinterpreted a statute enacted by the local District of Columbia Council, have specially set up or are claiming "any title, right, privilege or immunity . . . under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. § 1257(3), now § 1257(a).

3. Petitioners try to make the most of their impossible predicament by urging the uncertainty of the Court's

statutory jurisdiction as a reason for granting the writ. (Pet. 14-19.) The Court may find it appropriate some day to resolve the uncertainty left by *Key* v. *Doyle* (an uncertainty that becomes dubiety when the D.C. Council is the lawmaker) if it is confronted with a case that both satisfies the criteria of Rule 17 and involves the interpretation by the D.C. Court of Appeals of a D.C. Council statute. That will happen rarely. It has not happened here.

The decision below affects contractors and subcontractors and their employees in the District of Columbia only. It has no national implications. If it is reviewable at all, it is reviewable—at most—according to the highly deferential standard that the Court has always applied when reviewing the District of Columbia courts' rulings on issues of local law. By that standard, the case is as easy in its disposition as it is unimportant.

The court of appeals' interpretation of sections 4 and 5 of the new D.C. workers compensation law is reasonable on its face. It accords with the interpretation of those sections by a number of the courts that have considered the issue. It accords with the view of the very similar sections 4 and 5 of the Longshore Act taken by three Justices of this Court. It accords with the view of Congress as to what those sections of the Longshore Act meant from 1927 until 1983 and with what they continue now to mean after Congress amended them to make its intent clear. The court of appeals' interpretation does not present one of those "exceptional situations where egregious error has been committed" that might justify this Court in "overruling the courts of the District" on a local law matter. *Pernell* v. *Southall Realty*, 416 U.S. 363, 369 (1974), quoting *Fisher* v. *United States*, 328 U.S. 463, 476 (1946).

Add to the reasonableness on its face of the court's interpretation of the D.C. Code provisions the fact that, at the time the D.C. Council enacted its new workers

compensation statute and borrowed sections 4 and 5 of the Longshore Act, the most pertinent interpretations of those sections limited contractors' freedom from tort suits in the same way the court's interpretation of the new local sections 4 and 5 does. Under the court of appeals' rule of construction, the Council was presumed to have adopted those interpretations of the statute it was borrowing. Petitioners rail against this rule of construction in its application here (Pet. 24 n.16), invoking this Court's authority for the indubitable proposition that sometimes the presumption has little relationship to reality. But this Court has been known to indulge in the presumption itself,[4] and it surely is not an "egregious error" for another court to do so.

What the bluster in this part of the petition (Pet. 19-29) comes down to is that the court of appeals' interpretation of the Council's enactment differs from this Court's interpretation of the Longshore Act in *WMATA*. That, however, should be the beginning of analysis, not the end. The question that has to be asked after the difference in interpretation is acknowledged is whether the court of appeals was bound by this Court's decision. There is no reason in logic, constitutional imperative, statute or precedent for an affirmative answer to the question.

Petitioners manage to suggest that there might be a reason only by blurring the critical fact that there are two separate statutes, one enacted by Congress and construed in *WMATA* and the other enacted by the Council (before *WMATA* was decided) and construed by the court of appeals here. (*See especially* Pet. 19-20.) It is true that the latter statute, in sections 4 and 5, is mod-

---

[4] Joines v. Patterson, 274 U.S. 544, 549 (1927); Sexton v. Dreyfus, 219 U.S. 339, 344 (1911); James v. Appel, 192 U.S. 129, 135 (1904). *See also* Lorillard, Inc. v. Pons, 434 U.S. 575, 580-81 (1978).

eled on the former. (But it is not true that the statutes are identical. The Longshore Act does not contain the reciprocal definitions of "employee" and "employer" found in D.C. Code §§ 36-301(9) and (10) and emphasized by the court of appeals (Pet. App. 7a-8a) as inconsistent with an employer-employee relationship between a contractor and the employees of its subcontractors.) It is also true, as petitioners tell us at numbing length (Pet. 21 & n.13), that state courts often find federal court interpretations of statutes their legislatures have borrowed persuasive. But they are not bound by those interpretations, even when they have emanated from this Court. *Cf. Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942); *Miller's Executors* v. *Swann*, 150 U.S. 132, 136-37 (1893). The six Justices of the majority in *WMATA* may wish their opinion had been found more persuasive by the court of appeals. That is not the issue. The issue, if there is any issue at all, is whether the court of appeals was egregiously wrong. That is not a debatable issue.

4. For want of any intrinsic merit to the questions advanced, the petition becomes an indictment of the court of appeals, and particularly Judge Mack, for *lèse majesté*. Since *lèse majesté* is not a crime in the United States, even within judicial hierarchies, this Court need not decide whether it, as the target of the alleged indignities, is the proper body to sit in judgment on the indictment. In any event, the indictment is overdrawn. After all, in no other jurisdiction than the District of Columbia does this Court's *WMATA* interpretation of sections 4 and 5 of the Longshore Act have any vitality. Congress wiped it off the books as soon as it could, for both future and pending cases. However, by the decision of the court below in *Estep* v. *Construction General, Inc.*, 546 A.2d 376 (D.C. 1988) (Pet. App. 42a-70a), the *WMATA* interpretation governs cases that arose in the District before the new local workers compensation act became effective

in 1982 and the statute making the Longshore Act applicable in the District was repealed. The court held that the general federal savings statute, 1 U.S.C. § 109, preserved this Court's post-repeal interpretation of the saved statute in *WMATA* in 1984, although it excluded the congressional amendment of the statute to overrule *WMATA* in the same year. As Judge Mack pointed out in her dissent, "[t]here is a certain incongruity in the majority's reasoning that the Congress cannot amend a statute no longer in existence but that the Supreme Court can interpret it." (Pet. App. 69a.) The incongruity is understandable in jurisprudential theory, but the court that is responsible for the incongruity can certainly not be said to be disrespectful of this Court's authority.

And what of Judge Mack? In her opinion for the court in the cases that are the subject of the petition, she said little more than what is obvious: that in *WMATA* "the Supreme Court *did not* interpret the District of Columbia Workers' Compensation Act of 1979" and that her court in those cases *was* interpreting the local 1979 statute. (Pet. App. 5a-6a; emphasis in original.) When discussing the court of appeals' rule of construction of borrowed statutes, she also said, by way of emphasizing that it is only prior judicial interpretations of the borrowed statute that qualify for the presumption that they were adopted by the Council, that "[a]ny subsequent interpretations by this court will be binding on us; any subsequent interpretations by another court carry no precedential value." (Pet. 11a.) The petition truncates this comment and flaunts the truncated version as proof of Judge Mack's lack of respect for the authority of this Court. (Pet. 12, 14.) In truth, however, she was making a point as obvious as the one she made at the outset of her opinion: an interpretation by this Court of the Longshore Act after it was borrowed does not help determine what the Council meant in borrowing it; nor is it an authoritative interpretation of the Council's statute itself.

In her dissent in the *Estep* case, Judge Mack said some things that may be more debatable. But—to take what may be the most debatable example—her suggestion, offered "delicately" and rejected by her colleagues of the majority, that "it is not at all clear that acts of Congress affecting only the District are 'laws of the United States' within the meaning of Article III" (Pet. App. 59a) played no part in the court's decision in this case. The indictment of Judge Mack is a red herring.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM H. ALLEN *
STEVEN SEMERARO
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Respondents

JOSEPH H. KOONZ, JR.
PATRICK M. REGAN
MARK J. BRICE
MARC FIEDLER
Koonz, McKenney &
Johnson, P.C.
2020 K Street, N.W.
Washington, D.C. 20006
(202) 659-5500
Attorneys for Respondents
Meiggs and Frazier

PETER J. VANGSNES
Ashcraft & Gerel
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400
Attorney for Respondents Hobbs

May 1989

* Counsel of Record

MOTION FILED
MAY 18 1989

No. 88-1692

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,
v.
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,
v.
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AND THE STATE OF MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300

MARY SUE TERRY *
Attorney General of Virginia
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219
(804) 786-2071

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Court Should Grant Certiorari to Preserve the Interests of the Signatories to an Interstate Compact	5
II. The Court Should Grant Certiorari to Maintain the Integrity of Its Decisions and to Prevent Re-Litigation of Settled Matters	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Anderson v. Thorington Construction Co., 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed*, 363 U.S. 719 (1960) 7

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932), *overruled on other grounds, Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938) 9

Evans v. Newport News Shipbuilding & Dry Dock Co., 361 F.2d 364 (4th Cir.), *cert. denied*, 385 U.S. 959 (1966) 7

Meiggs v. Associated Builders, Inc., 545 A.2d 631 (D.C. 1988) ..... *passim*

O'Connell v. Maryland Steel Erectors, Inc., 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986) 7

Rasnick v. The Pittston Co., Inc., Nos. 870436 and 870437 (Va. Apr. 21, 1989) 7

State ex rel. Reynolds v. City of Baltimore, 199 Md. 289, 86 A.2d 618 (Md. 1952) 7

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 8, 9

United States v. Maine, 420 U.S. 515 (1975) 8, 9

WMATA v. Johnson, 467 U.S. 925 (1984) ..... *passim*

STATUTES

Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 94-306, 90 Stat. 672 (1976) 2

Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), as amended by the National Capital Area Transit Act of 1972, Pub. L. No. 92-517, § 601, 86 Stat. 999 (1972) 2

Compact, Pub. L. No. 94-306, 90 Stat. 672

District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) (repealed 1982) 3, 5

District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) 3, 5

TABLE OF AUTHORITIES—Continued

Page

Md. Ann. Code art. 101, § 62 (1985 Replacement Vol.) 7

1965 Md. Laws Ch. 869, *codified at* Md. Ann. Code [Transportation] § 10-204, -205 (1977 & Supp. 1988) 2

Va. Code Ann. §§ 65.1-30, 1-40 (1987 Replacement Vol.) 7

1966 Va. Acts Ch. 2, *referenced at* Va. Code Ann. § 56-529, -530 (1986 Replacement Vol. & Supp. 1988) 2

RULE

Sup. Ct. R. 36.4 2

OTHER AUTHORITIES

1B J. Moore, J.D. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[3-1] (2d ed. 1988) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AND THE STATE OF MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Commonwealth of Virginia and the State of Maryland [1] are Signatories to the Washington Metropolitan Area Transit Authority Compact.[2] The Compact created the Washington Metropolitan Area Transit Authority ("WMATA") as an interstate agency of Virginia and Maryland, as well as the District of Columbia, and charged WMATA with the responsibility for constructing, operating and maintaining the Metro Transit System for the people of the greater Washington, D.C. vicinity on behalf of the Signatories. Virginia and Maryland have a continuing role in the construction, operation and maintenance of the Metro Transit System through their representatives on the WMATA Board. In addition, Virginia and Maryland help to finance that system by contributing state funds for WMATA's operating budget, from which WMATA pays damages awards and claims under the workers' compensation programs of all three jurisdictions.[3]

Based on their interests in WMATA, Virginia and Maryland participated in *WMATA v. Johnson*, 467 U.S. 925 (1984), as *amici curiae* in support of WMATA. In *WMATA v. Johnson*, this Court found the statutory language at issue to be "plain" and "clear," and de-

---

[1] The Commonwealth of Virginia and the State of Maryland submit this brief as *amici curiae* pursuant to Sup. Ct. R. 36.4.

[2] Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), as amended by the National Capital Area Transit Act of 1972, Pub. L. No. 92-517, § 601, 86 Stat. 999 (1972), and the Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 94-306, 90 Stat. 672 (1976). *See* 1966 Va. Acts Ch. 2, *referenced at* Va. Code Ann. § 56-529, -530 (1986 Replacement Vol. & Supp. 1988); 1965 Md. Laws Ch. 869, *codified at* Md. Ann. Code [Transportation] § 10-204, -205 (1977 & Supp. 1988).

[3] The suburban Virginia communities served by Metrorail and Metrobus also contribute to the operation of the transit system.

termined that under that language general contractors such as WMATA are entitled to immunity "unless the contractor has neglected to secure workers' compensation coverage after the subcontractor failed to do so." 467 U.S. at 936, 938. Consequently, this Court specifically concluded that WMATA, which had purchased a comprehensive "wrap-up" insurance policy, had not defaulted on its statutorily-defined duty and, therefore, was clearly entitled to immunity. *Id.* at 940-41.

Nevertheless, in *Meiggs v. Associated Builders, Inc.*, Petitioners' Appendix ("Pet. App.") 1a-17a, the District of Columbia Court of Appeals has refused to follow this Court's construction of the same statutory language [4] and held that general contractor immunity is available in the District "*only* when the actual employer—the subcontractor—defaults on its statutory obligation, and the general contractor steps in to secure payment." Pet. App. 9a (emphasis in original). Thus, under *Meiggs* WMATA would not be entitled to immunity even though the wrap-up policy purchased by WMATA "guaranteed that every Metro subcontractor would satisfy and keep satisfied its primary statutory obligation to obtain worker's compensation coverage." *WMATA v. Johnson*, 467 U.S. at 940.

Accordingly, unless the *Meiggs* decision is reversed, WMATA will be subject to tort liability in the District of Columbia in addition to the workers' compensation awards it has already paid. Such liability would have a

---

[4] Although the actual statute that was before the *Meiggs* court is different—the District of Columbia Workers' Compensation Act of 1979 versus the District of Columbia Workmen's Compensation Act of 1928—the exact statutory language at issue before that court was the same as that before this Court in *WMATA v. Johnson*.

serious, adverse financial impact upon both Virginia and Maryland.[5]

SUMMARY OF ARGUMENT

Contrary to the uniform understanding of the Signatories to the WMATA Compact, the *Meiggs* decision creates an anomaly in the law concerning general contractor immunity. The laws of Virginia and Maryland clearly provide a general contractor under the circumstances at issue with complete immunity from suit for all employment-related accidents. At the time of the adoption of the WMATA Compact, the Signatories presumed that the same principles of immunity would apply in the District of Columbia and consequently intended that WMATA be uniformly provided with immunity in all three jurisdictions. In *WMATA v. Johnson*, this Court definitively confirmed that WMATA is entitled to immunity in the District of Columbia. Accordingly, if the D.C. Court of Appeals' contradictory decision in *Meiggs* is allowed to stand, the Signatories' intent, expectations and reliance will be subverted.

The Signatories not only have an important interest in protecting the viability and uniform treatment of their interstate compact; they also have an important interest in conserving their litigation resources and maintaining the integrity of judicial decisions in their favor. Here, both the Signatories and WMATA itself—as well as the courts—have expended considerable time, effort, and fi-

---

[5] There is no question that the lower court's refusal to follow this Court's *WMATA v. Johnson* decision will also have an adverse financial impact on the third Signatory to the WMATA Compact—the District of Columbia. The District Government's participation as an *amicus* in support of the petition was therefore sought, but the District declined to participate. We understand from counsel to the petitioners that the basis for the refusal is the District's view that this Court should *never* review a local District law, even where, as here, the D.C. Court of Appeals has refused to follow this Court's construction of language incorporated in that law.

nances in litigating the meaning of statutory language governing WMATA's immunity in the District of Columbia. That meaning was definitively settled by this Court's decision in *WMATA v. Johnson*. The lower court's decision to reopen that question not only flouts this Court's authority, but it also offends all the important interests protected by *stare decisis*. This Court should not permit such a result.

ARGUMENT

I. The Court Should Grant Certiorari to Preserve the Interests of the Signatories to an Interstate Compact.

The decision of the D.C. Court of Appeals in *Meiggs* to deny general contractors immunity under the circumstances at issue will have an adverse impact on the considerable financial interests that Virginia and Maryland have in WMATA. WMATA's revenues are intended to be the principal source of its operating funds; however, Virginia and Maryland, along with the District of Columbia and the federal government, compensate for the operating deficit as well as provide construction funds. Both Virginia and Maryland have a substantial commitment to funding WMATA's construction and operating costs.

For example, in fiscal year 1989 alone Virginia's financial commitment to WMATA exceeds $57,500,000.00, which includes the approximately $10,000,000.00 that Virginia is required to provide annually on behalf of the cities of Alexandria, Fairfax and Falls Church and the counties of Fairfax and Arlington.[6] And, it is expected that Virginia's total commitment in fiscal year 1990 will be close to $70,000,000.00. More specifically, approximately $14,000,000.00 of Virginia's total commitment in fiscal year 1989 is for WMATA's construction budget, from which any tort judgments or settlements

[6] In addition, the localities of Alexandria, Arlington, Fairfax City, Fairfax County, and Falls Church will provide additional funds in fiscal year 1989 totalling approximately $74,100,000.00.

would be funded. Similarly, the Maryland Department of Transportation's contribution to WMATA's construction budget for fiscal year 1989 is close to $19,000,000.00 and is anticipated to total $22,343,000.00 in fiscal year 1990. Moreover, in fiscal year 1989 Maryland's contribution to WMATA's operating deficit is approximately $44,300,000.00, an amount which is expected to rise to approximately $45,184,000.00 in fiscal year 1990.[7]

Thus, a ruling that suddenly exposes WMATA to liability in the District of Columbia when it previously was entitled to immunity will undoubtedly have a substantial adverse impact on the States' treasuries.[8] Moreover, denying WMATA immunity would threaten the integrity of and eliminate the cost savings from WMATA's wrap-up insurance program, which efficiently provides a myriad of benefits that would be lost if individual subcontractors were forced to obtain their own compensation coverage. *See WMATA v. Johnson*, 467 U.S. at 928-29.

When they entered into the WMATA Compact, Virginia and Maryland did not intend that they would have to bear such substantial costs based on WMATA's exposure to tort liability as to injuries for which it provided worker-compensation benefits. Rather, the Signatories to the Compact had a *mutual* understanding that there would be *uniform* treatment with respect to the liabilities that WMATA would incur under the Compact and that that treatment would include immunity in the circumstances presented by the *Meiggs* cases. Indeed, at the time the Compact was entered—and as remains

---

[7] Prince George's County and Montgomery County also contribute to WMATA's operating deficit: in fiscal year 1989 their contributions total approximately $14,767,000.00, and in fiscal year 1990 they will contribute approximately $15,062,000.00.

[8] Indeed, because a large part of the unbuilt Metrorail System—the Green Line—lies within the District of Columbia and workers' compensation claims typically arise in the construction context, the impact of the *Meiggs* decision will certainly be felt in Virginia and Maryland if not overturned.

true today—the law in both Virginia and Maryland clearly provided general contractors with complete immunity from tort suits in circumstances like those at issue in *Meiggs*.[9] Plainly, neither Virginia nor Maryland would have assumed liability for an interstate agency in which it has a considerable financial interest in circumstances where its own private contractors would not be liable under the State's laws.

Moreover, Virginia and Maryland's understanding that general contractors also enjoyed immunity in the District of Columbia was confirmed by the D.C. Court of Appeals in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986). In *O'Connell*, the court ruled that one important purpose of the D.C. Council in adopting the 1979 Workers' Compensation Act was to ensure that the workers' compensation law in D.C. would be in close conformity with comparable Maryland and Virginia law. 495 A.2d at 1141 & n.13. Because the D.C. Council, in the 1979 Act, did not change any of the immunity provisions that existed at the time the WMATA Compact was formed, it should be assumed that D.C. law with respect to immunity was already in conformity with Virginia and Maryland law. Indeed, this Court's decision in *WMATA v. Johnson* confirmed that D.C. law prior to the 1979 Act paralleled Virginia and Maryland law.

---

[9] *See, e.g.*, Md. Ann. Code art. 101, § 62 (1985 Replacement Vol.); *State ex rel. Reynolds v. City of Baltimore*, 199 Md. 289, 86 A.2d 618 (Md. 1952); Va. Code Ann. §§ 65.1-30, 1-40 (1987 Replacement Vol.); *Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir.), *cert. denied*, 385 U.S. 959 (1966); *Anderson v. Thorington Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed*, 363 U.S. 719 (1960); *see also Rasnick v. The Pittston Co., Inc.*, —— Va. ——, —— S.E. 2d —— (1989) (reaffirming immunity of statutory employer by holding that an injured employee of subsidiary corporation who had received workers' compensation payments was barred from maintaining tort action against subsidiary's parent and sister corporations, who were found to be statutory employers).

Thus, by denying general contractors immunity, the *Meiggs* decision is in complete conflict with the laws of Virginia and Maryland. This result is contrary not only to the D.C. Court of Appeals' prior interpretation of the purposes of the D.C. workers' compensation law, but also to the agreed-upon intent of the Signatories to the WMATA Interstate Compact that there would be uniform treatment with respect to the liabilities that WMATA would incur.

Accordingly, the Court should grant certiorari to preserve the interests of the Signatories to the WMATA Compact.

II. The Court Should Grant Certiorari to Maintain the Integrity of Its Decisions and to Prevent Re-Litigation of Settled Matters.

In *Meiggs*, the D.C. Court of Appeals addressed precisely the same statutory language that this Court construed in *WMATA v. Johnson*, but refused to follow this Court's construction of that language. In defying this Court's decision, the D.C. Court of Appeals ignored the practical values served by *stare decisis* and substantially impaired the interests of the parties—including Virginia and Maryland as *amici curiae*—who fully litigated and subsequently relied on this Court's dispositive ruling in *WMATA v. Johnson*.

Notwithstanding the D.C. Court of Appeals' cavalier attitude toward this Court's precedents, "the doctrine of *stare decisis* is still a powerful force in our jurisprudence." *United States v. Maine*, 420 U.S. 515, 527 (1975). As this Court has explained, *stare decisis* "not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." *Thomas v. Washington Gas*

Light Co., 448 U.S. 261, 272 (1980). Accordingly, this Court has "long held that the doctrine of *stare decisis* carries particular force where the effect of re-examination of a prior rule would be to overturn" accepted commercial practice. *Maine*, 420 U.S. at 528 n.9. *Cf. Thomas*, 448 U.S. at 277 (principles of *stare decisis* not served by attempting to revive decision upon which "there appears to be little danger that there has been any significant reliance on its rule").[10] In *Meiggs*, the D.C. Court of Appeals undermined this Court's authority by completely disregarding the broader societal interests served by the doctrine of *stare decisis*.

In *WMATA v. Johnson*, this Court definitively construed statutory language and found its meaning "plain" and "clear." WMATA was a party to that case, and Virginia and Maryland, as *amici curiae* in support of WMATA, demonstrated the substantial interest they have concerning the issue of general contractor immunity. Virginia and Maryland believed that this Court's dispositive ruling on that issue finally settled the question and ensured that the law among the three signatory

---

[10] One commentator has explained that under the doctrine of *stare decisis* "courts must take into account both the possible unfairness in repudiating an established principle on which there has been justifiable reliance and the level of disruption that will be brought about by change." 1B J. Moore, J.D. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[3-1] at 50 (2d ed. 1988). Moreover, because society has "a strong interest in stability, predictability, and equal treatment . . . change in law can come through legislation . . . [and] [i]t is often better that it does . . . [because] [t]he legislative process involves public discussion . . . and is calculated to expose the views of a spectrum of persons who may be affected by changes in the law." *Id.* at 47. *Cf. Thomas*, 448 U.S. at 272 n.18 (*stare decisis* has more limited application when precedent rests on constitutional grounds because "correction through legislative action is practically impossible") (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting), *overruled on other grounds, Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938)).

jurisdictions was uniform, as the Signatories understood it to be. Both States, as well as WMATA, have significantly relied on this Court's decision, which is now five years old.

Although the D.C. Court of Appeals considered precisely the same issue and statutory language that this Court construed in *WMATA v. Johnson*, that court defied this Court's ruling and reached a completely opposite result. The *Meiggs* decision is manifestly unfair inasmuch as it significantly impairs the interests of the parties and *amici* that were settled in *WMATA v. Johnson* and that have solidified through reliance on that decision.

Accordingly, Virginia and Maryland, as *amici curiae*, fully support the portion of the Petition that urges the Court to grant certiorari so that the Court may maintain the integrity of its decisions.

CONCLUSION

For all of the foregoing reasons, the Court should grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

MARY SUE TERRY *
Attorney General of Virginia
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219
(804) 786-2071

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300

* Counsel of Record

No. 88-1692

MOTION FILED
MAY 18 1989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
v. *Petitioner,*
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
v. *Petitioner,*
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
v. *Petitioner,*
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ROBERT L. POLK *
ARNOLD I. MELNICK
ROBERT J. KNIAZ
600 5th Street, N.W.
Washington, D.C. 20001
(202) 962-1275
Counsel for Amicus Curiae Washington Metropolitan Area Transit Authority

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

MOTION OF THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Washington Metropolitan Area Transit Authority ("WMATA") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for

petitioners to the filing of this brief was obtained. However, the consent of counsel for respondents was refused.

WMATA is the mass transit agency serving the Washington, D.C. metropolitan area that was created with Congress' approval by an Interstate Compact whose signatories include the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. Since the early 1970s, WMATA, which is responsible for constructing and operating the Metrorail transit system, has employed a wrap-up insurance program to guarantee workers' compensation coverage. Under this wrap-up program, WMATA, instead of its individual subcontractors, acquires workers' compensation coverage for *all* Metrorail construction laborers by purchasing a single, comprehensive insurance policy.

In *WMATA v. Johnson*, 467 U.S. 925 (1984), this Court specifically concluded that under the plain language of the District of Columbia Workmen's Compensation Act of 1928 WMATA's wrap-up program entitled it to immunity from tort liability for injuries sustained by its subcontractors' employees. In the five years since the *WMATA v. Johnson* decision, WMATA has continued its wrap-up program in reliance on that decision. However, the lower court's refusal to follow this Court's construction of the same statutory language that was at issue in *Johnson* jeopardizes the continued utility of WMATA's wrap-up program. If WMATA is liable for injuries to subcontractors' employees notwithstanding the fact that it has secured compensation benefits for those workers, the wrap-up coverage would be uneconomical for WMATA. Furthermore, the threat of unexpected millions of dollars in tort liability will pose serious budgetary problems for WMATA and threaten the stability and financial integrity of transportation services in the Washington metropolitan area.

Accordingly, WMATA submits that its participation as *amicus* will aid the Court's understanding of the im-

portant interests that are affected by the *Johnson* decision and that are now seriously threatened by the lower court's decision.

Respectfully submitted,

ROBERT L. POLK *
ARNOLD I. MELNICK
ROBERT J. KNIAZ
600 5th Street, N.W.
Washington, D.C. 20001
(202) 962-1275
Counsel for Amicus Curiae
Washington Metropolitan
Area Transit Authority

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	2
A. Introduction	2
B. WMATA's Worker-Compensation Program	2
C. WMATA's Judicial Defense of Its Worker-Compensation Program	4
D. The Importance of *Johnson* to WMATA	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. The Decision Below Violates the Doctrine of *Stare Decisis* by Failing to Adhere to this Court's Definitive Construction of the Statutory Language at Issue	8
II. The Decision Below Would Severely Undermine the Longstanding Workers' Compensation Programs Employed by WMATA and Other General Contractors in the District of Columbia	10
III. These Cases Constitute Unauthorized Policy-making by the Court Below	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Allen v. United States, 625 F. Supp. 841 (D.D.C. 1986) 8
Chan v. Korean Air Lines, Ltd., 57 U.S.L.W. 4432 (April 18, 1989) 14
Estep v. Construction General, Inc., C.A. No. 126-81 (D.C. Sup. Ct. April 3, 1985) 9
Estep v. Construction General, Inc., 546 A.2d 376 (D.C. 1988) 5, 9
Ford v. United States, No. 84-3082 (D.D.C. March 22, 1985) 8
Frazier v. Faith Construction Co., C.A. No. 6602-84 (D.C. Sup. Ct. July 23, 1985) 9
Hatter v. George A. Fuller Co., C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984) 9
Hobbs v. KBR Corp., C.A. No. 803-84 (D.C. Sup. Ct. Nov. 19, 1985) 9
Holmes v. Leon N. Weiner & Associates, 603 F. Supp. 122 (D.D.C. 1985) 8
In re Metro Subway Accident Referral, 630 F. Supp. 385 (D.D.C. 1984), *aff'd*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987) 8
Keener v. WMATA, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) 5, 8
Meiggs v. Associated Builders, Inc., C.A. No. 2563-84 (D.C. Sup. Ct. May 1, 1985) 8
O'Connell v. Maryland Steel Erectors, Inc., 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986) 5
Stokes v. George Hyman Constr. Co., No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir. Jun. 24, 1985) 8
The Amiable Isabella, 19 U.S. (6 Wheat.) 1 71 (1821) 14
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 9
United States v. Maine, 420 U.S. 515 (1975) 9
WMATA v. Johnson, 467 U.S. 925 (1984) ..... *passim*

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS Page

District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) (repealed 1982) 5
District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) 5
National Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982 & Supp. IV 1986) 5
Urban Mass Transportation Act of 1964, § 12, 49 App. U.S.C.A. § 1615(f) (Supp. 1989) 3
Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966) 2
49 C.F.R. §§ 23.1 *et seq.* (1987) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

A. Introduction.

The Washington Metropolitan Area Transit Authority ("WMATA") is the mass transit agency serving the Washington, D.C. metropolitan area. WMATA is an interstate agency created with Congress' approval by the Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), whose signatories included the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. It is this Court's decision in favor of WMATA in *WMATA v. Johnson*, 467 U.S. 925 (1984)—along with the lower court's refusal to follow that decision in the present cases—that forms the centerpiece of the present petition for a writ of certiorari. Because WMATA has placed great reliance on the *Johnson* decision, because the lower court's refusal to follow that decision threatens WMATA's ability to ensure continued compensation benefits to injured workers, and because that refusal may also jeopardize WMATA's delivery of transportation services in the Washington area, WMATA strongly supports the petition.

B. WMATA's Worker-Compensation Program.

WMATA is responsible for constructing and operating the public transportation system in and around the Nation's Capital, including the rapid transit system popularly known as Metrorail. Primarily as a result of the still-ongoing construction of the Metrorail system, WMATA has become one of the Washington metropolitan area's largest general contractors, contracting with literally scores of subcontractors to carry out the actual construction of the system. In its capacity as the general contractor for the Metrorail system, WMATA has consistently met its obligations under the District of Columbia's workers' compensation statutes to secure workers' compensation for the employees of its subcontractors.

Beginning in the early 1970s, WMATA departed from its prior practice of allowing each individual subcontractor to purchase workers' compensation insurance for its own employees, and adopted instead a centralized insurance program known as a "wrap-up" program. Under its wrap-up approach to guaranteeing compensation, WMATA, rather than its individual subcontractors, actually acquires workers' compensation coverage for *all* Metrorail construction laborers by purchasing a single, comprehensive insurance policy. Wrap-up programs like WMATA's are now commonplace in large-scale construction projects in the District of Columbia.

WMATA adopted its wrap-up approach for several reasons. First, WMATA's prior experience was that many of its subcontractors, most notably many of its minority subcontractors,[1] were unable to obtain and/or qualify for individual workers' compensation insurance policies. The wrap-up approach eliminates this problem. In addition, a centralized wrap-up policy ensures that coverage for injured employees is both comprehensive and continuous, whereas under a system in which individual subcontractors obtain insurance, individual policies may lapse without the general contractor having knowledge of the resultant gap in employee coverage.

Moreover, a wrap-up policy is beneficial to employees and the courts, since a single insurance policy obtained by the general contractor eliminates the need for courts to referee disputes as to which entity in the chain of contractors—*e.g.*, the subcontractor or the general contractor—should pay for a particular worker's injuries. Under a wrap-up policy, employees who can make the requisite demonstration of work-related injuries directly

---

[1] Because it receives federal funding, WMATA is charged with ensuring that minority business enterprises have a full opportunity to participate in construction of the Metrorail system. *See* Urban Mass Transportation Act of 1964, § 12, 49 App. U.S.C.A. § 1615(f) Supp. 1989; 49 C.F.R. §§ 23.1 *et seq.* (1987).

qualify for compensation under the general contractor's policy without having to first demonstrate that their immediate employers, the subcontractors, had affirmatively defaulted on their separate obligation under the statute to secure compensation. In addition, a wrap-up policy is preferable because, in WMATA's experience, a single insurance policy incurs smaller premiums than would be the case if the numerous subcontractors independently had to purchase separate insurance policies.

Finally, WMATA adopted the wrap-up approach to compensation with the understanding that it would be entitled to the immunity from tort suits brought by injured subcontractor employees that the District workers' compensation laws bestow upon those entities that do not default on their statutory duty to secure workers' compensation. As this Court recognized in *WMATA v. Johnson*, this immunity is the *quid pro quo* that underlies all workers' compensation programs: in return for guaranteeing that compensation will be available to injured employees, employers or contractors are immunized from tort suits by those employees for those same injuries. 467 U.S. at 931-32.

C. WMATA's Judicial Defense of Its Worker-Compensation Program.

WMATA has had its wrap-up program in place for over 15 years. When necessary, WMATA has moved vigorously in the courts to protect the integrity of the program and its entitlement to immunity under it. Thus, WMATA was the prevailing party in this Court's 1984 *Johnson* decision, which definitively construed the District's statutory language in question to confer immunity upon general contractors such as WMATA. *See WMATA v. Johnson*, 467 U.S. at 940-41. Similarly, WMATA took the lead, either as a named party or as *amicus curiae*, in the extensive litigation following the *Johnson* decision which has confirmed that *Johnson*'s rule of immunity is still applicable in the District of Columbia notwithstand-

ing Congress' 1984 amendments to the National Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982 & Supp. IV 1986), which were aimed at legislatively nullifying the *Johnson* decision at the national level. *See, e.g., Keener v. WMATA*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Estep v. Construction General, Inc.*, 546 A.2d 376 (D.C. 1988) Petitioners' Appendix ("Pet. App.") 42a-70a.[2]

Having successfully defended the integrity of its wrap-up program in the *Johnson/Keener/Estep* line of cases that arose under the District's 1928 workers' compensation statute (the "1928 Act"),[3] WMATA has also participated as an *amicus curiae* in the instant litigation, which arises under the District's current workers' compensation law (the "1979 Act").[4] Because the 1979 Act adopted virtually verbatim the precise statutory language construed in the *Johnson*, *Keener*, and *Estep* cases, WMATA has vigorously contended that this Court's construction of that language should be followed, in the absence of any affirmative indication that the legislature intended that language to mean something different in the 1979 Act than it meant in the predecessor 1928 Act. Now, however, the lower court has held in two contradictory decisions that while the 1928 Act grants WMATA immunity (*Estep v. Construction General*), the same statutory language in the 1979 Act denies immunity (the decision below).

---

[2] WMATA also participated in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986), which was the first appellate decision to reject the contention that the 1984 amendments to the National Longshore Act applied to cases arising under the District's compensation statute.

[3] District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) (repealed 1982).

[4] *See* District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981).

D. The Importance of *Johnson* to WMATA.

In the five years since this Court's *Johnson* decision, WMATA has continued its wrap-up program in reliance on that decision. WMATA has expended approximately $19.5 million to secure its wrap-up insurance policies during that time. Now, however, the utility of WMATA's wrap-up program is in serious jeopardy as a result of the opinion below, which holds, *in direct contradiction to this Court's Johnson decision*, that WMATA is liable for injuries to subcontractor employees notwithstanding the fact that it has secured workers' compensation benefits for those workers. Plainly, if WMATA is to receive no *quid pro quo* immunity in exchange for acquiring workers' coverage, that full coverage makes no economic sense to WMATA. Moreover, the threat of unexpected, untold millions of dollars in tort liability not only will pose enormous budgetary problems for WMATA and its signatories, but it may also threaten the stability and financial integrity of transportation services in the Washington metropolitan area.[5]

---

[5] WMATA's records show that approximately 1500 compensation claims have been filed against WMATA by injured subcontractor employees under the 1979 Act. With the construction of several segments of the Metrorail system still underway or planned, this figure will inevitably swell in the future. Based upon past patterns of tort filings in similar circumstances, WMATA could reasonably be expected to face at least a hundred million dollars in tort claims by the injured employees if WMATA is held not to be entitled to immunity under the 1979 Act by virtue of having secured compensation through the wrap-up program.

Under WMATA's budgetary procedures, any payments for tort damages would come from WMATA's construction funds. Diverting significant amounts of construction monies to tort payments would severely curtail WMATA's construction obligations. The resulting budgetary difficulties as a practical matter could be remedied only by contributions from the treasuries of the Signatories of the WMATA Compact. In this era of budgetary restraints at the state and local level and strong public opposition to governmental revenue increases of any kind, such a funding alternative realistically cannot be counted on to resolve tort-related funding short-

For all these reasons, WMATA has a paramount interest in these cases and in the protection of the *Johnson* decision.

SUMMARY OF ARGUMENT

In addition to flouting this Court's construction of the statutory language here at issue, the lower court's decision does violence to the principle of *stare decisis* and to the important interests that principle protects. WMATA and similarly-situated contractors have relied on the *Johnson* decision to put in place costly—and highly beneficial—worker-compensation programs. The lower court's purported rejection of *Johnson* is not only unfair to these contractors, but it also constitutes a misuse of judicial resources for that court to have relitigated the meaning of language *Johnson* found to be "plain."

Moreover, this purported rejection of *Johnson* will undermine the very purposes that worker's compensation statutes such as the District of Columbia's 1979 Act were designed to serve. Indeed, as *Johnson* itself made clear, the denial of immunity in cases such as the present ones will lead to gaps in worker coverage and needless legal disputes over which entity was responsible for that coverage—all to the detriment of injured workers in need of swift, sure compensation benefits.

Finally, these cases represent another instance of the kind of judicial legislation this Court has repeatedly condemned—lower courts implementing their own notions of wise policy in the face of plain language *the legislature* has adopted.

For all these reasons, in addition to those contained in the petition, the writ should be granted and the judgment below reversed.

---

falls. The result in such circumstances would then almost certainly lead to cutbacks in WMATA's overall services—to the detriment of the entire citizenry of (and many visitors to) the Washington metropolitan area.

ARGUMENT

I. The Decision Below Violates the Doctrine of *Stare Decisis* by Failing to Adhere to this Court's Definitive Construction of the Statutory Language at Issue.

The basic question presented by these cases—whether general contractors who do not default on their duty to secure workers' compensation are entitled under the statutory language in question to immunity from tort actions—has now been litigated before several courts, including this Court, for nearly a decade. This protracted litigation has arisen under both the District of Columbia's 1928 compensation statute and the 1979 Act, which have virtually identical statutory language. The courts that have considered this question have, at *every* level, ruled in favor of contractor immunity, including this Court in *WMATA v. Johnson*, 467 U.S. at 940; the United States Court of Appeals for the District of Columbia Circuit;[6] several Judges of the United States District Court for the District of Columbia;[7] several Judges of the Superior Court of the District of Columbia;[8] and even another division of the District of Co-

---

[6] *See Keener v. WMATA*, 800 F.2d 1173.

[7] For example, each of the five United States District Court Judges who ruled in the cases at issue in the consolidated *Johnson* litigation found in favor of contractor immunity. *See Johnson*, 467 U.S. at 930-31. *See also, e.g., In re Metro Subway Accident Referral*, 630 F. Supp. 385 (D.D.C. 1984), *aff'd*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987) (1928 Act case); *Holmes v. Leon N. Weiner & Associates*, 603 F. Supp. 122 (D.D.C. 1985) (1928 Act case); *Ford v. United States*, No. 84-3082 (D.D.C. March 22, 1985) (1979 Act case); *Stokes v. George Hyman Constr. Co.*, No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir. Jun. 24, 1985) (1979 Act case). *Contra, Allen v. United States*, 625 F. Supp. 841 (D.D.C. 1986) (1979 Act case).

[8] *E.g., Meiggs v. Associated Builders, Inc.*, C.A. No. 2563-84 (D.C. Sup. Ct. May 1, 1985) (Pet. App. 18a) (1979 Act case);

lumbia Court of Appeals in a decision handed down on the *same day* as the opinion below.[9] Yet despite these precedents, and, most importantly, in the face of this Court's authoritative decision in *Johnson*, the division of the District of Columbia Court of Appeals that considered the present cases reached a contrary result, holding that general contractors such as WMATA are *not* entitled to tort immunity.

The Court of Appeals' attempt to deviate from the series of decisions upholding contractor immunity under the District of Columbia's workers' compensation laws should not be sanctioned. It not only contradicts this Court's definitive construction of the statutory language at issue, but it also runs directly counter to the doctrine of *stare decisis*, a fundamental principle of American law that counsels strongly against re-litigation of already-settled issues, particularly when reopening decided questions would disrupt settled commercial practices. *E.g., United States v. Maine*, 420 U.S. 515, 527-528 & n.9 (1975).[10] Where, as here, not only this Court

---

Frazier v. Faith Construction Co., C.A. No. 6602-84 (D.C. Sup. Ct. July 23, 1985) (Pet. App. 20a) (1979 Act case); *Estep v. Construction Gen'l, Inc.*, C.A. No. 126-81 (D.C. Sup. Ct. April 3, 1985) (1928 Act case); *Hatter v. George A. Fuller Co.*, C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984) (1928 Act case). *Contra, Hobbs v. KBR Corp.*, C.A. No. 803-84 (D.C. Sup. Ct. Nov. 19, 1985) (Pet. App. 23a) (1979 Act case).

[9] *See Estep v. Construction General, Inc.*, Pet. App. 42a.

[10] *Accord, Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980):

> [*Stare decisis*] not only plays an important role in orderly adjudications; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rights. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.

Id. at 272.

but several other courts have construed the language at issue to mean one thing over a period of several years, it is simply too late in the day for a division of the District of Columbia Court of Appeals to decide unilaterally that the langauge means just the opposite.

By refusing to follow this Court's analysis in *Johnson*, the court below has upset the settled expectations of WMATA and all other general contractors in the District of Columbia who have secured compensation in the belief that they would receive statutory immunity from subcontractor employee tort suits in return. Such an outcome, if allowed to stand, would be highly inequitable—particularly to WMATA, which has expended considerable time, effort and funds in litigation over the last several years to establish the contractor immunity precedents set forth in the *Johnson/Keener/Estep* line of cases. Accordingly, this Court should grant the petition and reverse the decision below in order to protect the justified expectations of general contractors in the District of Columbia, to avoid the disruptions to ongoing commercial practices that would be caused by reopening settled questions of law, and to maintain the integrity of this Court's own precedent.

II. The Decision Below Would Severely Undermine the Longstanding Workers' Compensation Programs Employed by WMATA and Other General Contractors in the District of Columbia.

In addition to violating the rule of *stare decisis*, the decision below should be overturned in light of the adverse impact it will have on the willingness of general contractors to secure workers' compensation insurance policies in the District of Columbia. As was explained in the "Interest of *Amicus Curiae*" section above, many general contractors in the District have followed WMATA's lead in securing compensation for subcontractor employees through the purchase of wrap-up

workers' compensation insurance policies. In its own case, WMATA has been willing to undertake responsibility for securing compensation for *all* the workers involved in the construction of the Metrorail subway system because of its understanding that such an undertaking would entitle it to immunity from tort actions by any such employees who are injured during the course of their work. If the decision below is allowed to stand and general contractors such as WMATA are not entitled to such immunity under the 1979 Act through purchase of a wrap-up policy, the incentives for purchasing wrap-up insurance would largely disappear, and the workers' compensation arrangements for large-scale construction projects in the District of Columbia could revert to the balkanized, inefficient approach followed in prior years.

As this Court recognized in the *Johnson* decision, the wrap-up approach to compensation for major construction projects offers numerous advantages to several interested parties, all of which could be lost if the utility of wrap-up programs is undercut by the decision below. As Justice Marshall correctly observed in the *Johnson* opinion:

> if the benefits of securing compensation insurance—that is, tort immunity—did not accrue to contractors until subcontractors had affirmatively elected to default, then contractors would be reluctant to incur the considerable expense of securing compensation insurance until they are absolutely convinced that subcontractors were in statutory default. Inevitably, such a rule would create gaps in workers' compensation coverage . . . . [*Johnson*, 467 U.S. at 938.]

Thus, the decision below is harmful to *employees* as well as contractors, since it is the injured workers who suffer most if gaps in compensation coverage occur.

Moreover, such gaps in coverage as a practical matter are highly likely to occur in any complex, multi-faceted

construction project. As the Court found in *Johnson*, inasmuch as many subcontractors are small businesses, it is frequently the case that many such firms—particularly minority subcontractors—are "unable to afford or [lack] sufficient business experience to qualify for their own workers' compensation insurance policies." *Id.* at 929.[11] Gaps in compensation coverage might also occur if general contractors no longer have an incentive to purchase wrap-up policies because subcontractors on occasion allow their individual insurance policies to expire, or find that their insurance carriers have gone out of business. *Id.* Even the most diligent efforts of general contractors such as WMATA to monitor events in order to forestall gaps in statutory coverage historically have proven to be unable to forestall such gaps, given the complexity of large-scale construction projects and the numerous subcontractors involved in those projects. *Id.*

Employees, as well as the courts, benefit from adoption of wrap-up policies by general contractors in another significant way as well. When a general contractor secures a single workers' compensation insurance policy, an injured employee has no doubt where to obtain his or her workers' compensation benefits. Under the approach adopted by the court below, however, general contractors would be liable to provide compensation only upon a showing by the injured employee that his or her immediate employer, the subcontractor, had affirmatively defaulted on its own statutory obligation to secure compensation. This result is a virtual invitation to extensive and costly litigation over this issue in many future individual compensation claims. As this Court held in *Johnson*, there simply is nothing in the statutory lan-

---

[11] The frequent inability of minority contractors to obtain workers' compensation insurance in the past was particularly troublesome to WMATA, given its statutory duty to provide such businesses with a full opportunity to participate in construction of the Metrorail system. *See* note 1, *supra*.

guage which suggests that the legislature "intended to unleash such a difficult set of factual inquiries" upon injured employees. *Id.* at 939. Moreover, the avoidance of such burdensome litigation through purchase of wrap-up policies by general contractors has been most helpful to the nation's trial courts, which are already suffering from overcrowded dockets.

Thus, in addition to the financial savings afforded to contractors who procure wrap-up insurance policies, *id.* at 928, such policies provide significant benefits to injured employees, subcontractors, minority businesses, and the courts. The decision below, however, subverts all of these beneficial outcomes in favor of a strained construction of the statute that is at variance with the decisions of numerous other courts—including this Court in *Johnson*—that have construed the language in question to be plain and to bestow immunity on general contractors such as WMATA.

III. These Cases Constitute Unauthorized Policy-making by the Court Below.

The outcome in these cases is all the more troublesome because it smacks of little more than judicial legislation. As the petitioners point out, proposals to amend the 1979 Act to nullify the rule of contractor immunity have been introduced in the last two sessions of the D.C. Council; no action has been taken on those bills, however. *See* Pet. at 29 n.24. WMATA has monitored these legislative initiatives because of their potentially significant impact on WMATA if adopted, only to find that the normal workings of the legislative process have been superseded by the Court of Appeals' decision construing the plain statutory language in question to mean the opposite of what this Court said it meant (and that the authors of the proposed amendments to the 1979 Act necessarily viewed it to mean).

As Justice Scalia recently stated for the Court, "where the text is clear," courts "have no power to insert an amendment" because to do so—as the court below did here—is "to make, and not to construe," the law. *Chan v. Korean Air Lines, Ltd.*, 57 U.S.L.W. 4432, 4436 (April 18, 1989) (*quoting The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.). WMATA therefore agrees with the petitioners that this Court should grant the writ to confirm that if general contractors are to be stripped of immunity in the District of Columbia, that is a task properly left to the people's elected representatives, and not the courts.

CONCLUSION

For the reasons set forth above, as well as those set forth in the petition, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

ROBERT L. POLK *
ARNOLD I. MELNICK
ROBERT J. KNIAZ
600 5th Street, N.W.
Washington, D.C. 20001
(202) 962-1275
Counsel for Amicus Curiae Washington Metropolitan Area Transit Authority

* Counsel of Record

No. 88-1692

FILED
MAY 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,
v.
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,
v.
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

REPLY BRIEF FOR PETITIONERS

EDWIN A. SHERIDAN
DOHERTY, SHERIDAN & GRIMALDI
8408 Arlington Boulevard
Suite 200
Fairfax, Virginia 22031
(703) 698-7700
Counsel for Petitioner KBR Corporation

WALTER A. SMITH, JR.*
ROBERT B. CAVE
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
Co-Counsel for All Petitioners

* Counsel of Record

[List of Counsel Continued on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JAMES C. GREGG
MACLEAY & LYNCH, P.C.
1625 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 785-0123
Counsel for Petitioner
Associated Builders, Inc.

JOSEPH P. DYER
JOHN A. SUTHERLAND, JR.
SICILIANO, ELLIS, DYER
& BOCCAROSSE
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692
Counsel for Petitioner
Faith Construction Co.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
DISCUSSION	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Construction Laborers v. Curry, 371 U.S. 542 (1963) 3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 5
Del Vecchio v. Bowers, 296 U.S. 280 (1935) 9
DiNicola v. George Hyman Constr. Co., 407 A.2d 670 (D.C. 1979) 7
District of Columbia v. Carter, 409 U.S. 418 (1973) 9
Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988) 5
Key v. Doyle, 434 U.S. 59 (1977) 6
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 3, 4
Mitchell v. Forsyth, 472 U.S. 511 (1985) 3, 4
North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973) 4, 5
WMATA v. Johnson, 467 U.S. 925 (1984) ..... *passim*
Whalen v. United States, 445 U.S. 684 (1980) 4, 7, 8

CONSTITUTIONAL PROVISION

U.S. Const., art. I, § 8, cl. 17 1

STATUTE

28 U.S.C. § 1257 ..... 2, 3, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

REPLY BRIEF FOR PETITIONERS

Respondents seek to characterize these cases as presenting only the mundane task of construing a local workers-compensation law. But their characterization ignores that that local law is a District of Columbia law adopted pursuant to Article I, Section 8, Clause 17 of

the Constitution, that this Court has already definitively construed the precise language at issue from that law, that this Court has already rejected the D.C. Court of Appeals' construction of that very language, and that the D.C. Court of Appeals has in turn *rejected this Court's* construction of the language.

Respondents' characterization also ignores that in order to insist on *its* view of the statutory language at issue, the D.C. Court of Appeals has pronounced itself—not this Court—the "ultimate arbiter" of all D.C. laws. Respondents furthermore ignore that in order to justify its pronouncement the lower court has determined that *this Court erred* in failing to adhere to *that court's* prior construction and, moreover, that this Court has *no jurisdiction* to review a law (such as the present one) that is applicable only to the District of Columbia.

Even though the foregoing are the fundamental determinations that underlie the lower court's judgment in these cases, respondents' opposition to certiorari ("Opp.") largely avoids them. That opposition, instead, makes essentially two contentions: (1) that review of these cases is not warranted because, respondents say, the lower court committed no "egregious error" in its construction of the particular D.C. worker-compensation statute at issue; and (2) that the lower court's construction of that statute is not "final" within the meaning of 28 U.S.C. § 1257 and is for that reason not reviewable. Both contentions are wrong.

1. Respondents' contention that the D.C. Court of Appeals has not yet rendered a "final judgment" is based on a misstatement of the posture of these cases, a misapplication of the purposes of the "final judgment" rule, and a misreading of this Court's decisions construing that rule. Respondents characterize the D.C. Court of Appeals' judgment as "amount[ing] to the denial of motions to dismiss complaints for legal insufficiency under local law." Opp. 6-7. This is simply not so. Pe-

titioners' basic claim in these cases is that, under this Court's construction of the statutory provision at issue, they are wholly "immun[e] from employee tort suits" such as those presented here. *WMATA v. Johnson*, 467 U.S. 925, 931 (1984). This claim is completely unrelated to the merits of the employee tort suits, is not a mere defense to liability, and, contrary to respondents' characterization, has nothing to do with the "legal insufficiency" of the complaints. Rather, petitioners' claim is that they cannot be made to answer these suits at all, *regardless* of their legal sufficiency.

In such circumstances, this Court has often "held that state-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of [its] certiorari jurisdiction under 28 U.S.C. § 1257. *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Construction Laborers v. Curry*, 371 U.S. 542 (1963)." *Mitchell v. Forsyth*, 472 U.S. 511, 525 n.8 (1985). There are two reasons that such a decision is final.

First, as *Mitchell* made clear, there is an important distinction between immunity from suit—"an entitlement not to stand trial or face the other burdens of litigation"—and a "mere defense to liability." The former "is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526. Second, as the *Mitchell* Court's citation to *Mercantile National Bank* illustrates, a claim that suit cannot be maintained *at all* against a party "is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and, furthermore, "it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257" to resolve such a claim "now . . . rather than subject [the parties] . . . to long and complex litigation which may all be for naught . . . ." *Mercantile National Bank*, 371 U.S. at 558. Because of the nature of petitioners' immunity claim—a claim that

would be lost if they were forced by the judgment below to proceed to trial—the judgment rejecting that claim is final under this Court's decisions in *Mitchell* and *Mercantile National Bank*.[1]

Moreover, it is clear that the policies of the final judgment rule are fully served by applying the *Mitchell* and *Mercantile National Bank* cases here. Those policies, as respondents themselves recognize, are "avoiding piecemeal litigation" and " 'minimizing federal intrusion in state affairs.' " Opp. 7, citing *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). Here, as *Mercantile National Bank* demonstrates, petitioners' immunity claim is anterior to and separate from the tort lawsuit itself; resolution of that independent claim is *final* in the courts below and refusal to entertain that claim now will mean that the asserted immunity *from trial* will be "effectively lost." *Mitchell*, 472 U.S. at 526. Furthermore, not only would review of this separate matter involve no "intrusion" on the lower court's authority to litigate the merits of any tort suit that may properly be brought,[2] but failing to permit review could erode significant federal policy interests.

---

[1] Respondents purport to find our reliance on *Mitchell* and *Mercantile National Bank* "far afield" and "mystifying." Opp. 8-9. But that is only because (1) they refuse to acknowledge the difference between complete immunity from suit and a defense to liability, and (2) they (like the lower court) refuse to accept the proposition that a claim made under a law applicable only to the District of Columbia is a "federal" claim. *Whalen v. United States*, 445 U.S. 684, 687 (1980). See *infra* p. 7.

[2] It is debatable whether the "intrusion" factor is applicable here *at all*, given that the D.C. Court of Appeals does not have the authority of a State Supreme Court, and that this Court has plenary review authority over D.C. Court of Appeals decisions—including resolution of purely local matters. *Whalen v. United States*, 445 U.S. at 687-88.

The latter factor is overlooked entirely by respondents in their treatment of the "final judgment" point. Indeed, central to respondents' whole opposition is their insistence that no important policy interests are implicated by the judgment below; they say that our suggestions to the contrary are "breathtaking in [their] audacity—but wanting in good sense." Opp. 8. This flourish will not hide what is presented here. The judgment below turns on the proposition that the D.C. Court of Appeals is at liberty to reject any and all decisions of this Court—even definitive decisions construing the precise statutory language at issue—so long as a local D.C. law question is presented. To leave such a proposition unreviewed not only threatens to erode the authority of this Court over the lower court, but it casts confusion over the whole of District of Columbia law. Whose decisions govern that law—this Court's or the lower court's? Contrary to respondents' contentions, these matters *do* present important and recurring policy questions and, inasmuch as they have been finally determined by the lower court, they are now reviewable by this Court. *See Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1708-09 (1988).

Although respondents suggest that the mere fact that the D.C. Court of Appeals sent these cases back for trial makes its decision nonfinal, that is not the approach taken by this Court. Instead, the Court has consistently followed a "pragmatic," rather than a technical, approach in determining whether a judgment is "final" for purposes of 28 U.S.C. § 1257.[3] Under that approach, weighing the important considerations identified in *Mitchell*, *Mercantile National Bank*, and *Goodyear*, the judgment of the D.C. Court of Appeals is "final" and ripe for re-

---

[3] *See, e.g., Goodyear Atomic Corp. v. Miller*, 108 S. Ct. at 1709; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 486 (1975); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. at 159-62.

view by this Court.[4] And, as further discussed below, it is important that the Court review that judgment.

2. Significantly, respondents concede—albeit indirectly—that important, unsettled questions are presented by these cases. For example, they acknowledge that *Key v. Doyle*, 434 U.S. 59 (1977), leaves "uncertain" whether D.C. laws such as that at issue—one passed by the D.C. Council and not overturned by Congress—are "statutes of . . . the United States" within this Court's certiorari jurisdiction under 28 U.S.C. § 1257(3) (now § 1257(a)). Opp. 10. Respondents also acknowledge that it would be "appropriate" for this Court "some day to resolve [that] uncertainty . . . ." Opp. 11. But they argue that these are not the cases in which to do so because, they assert, there is nothing intrinsically important about the *particular* D.C. Council-passed statute at issue, *i.e.*, a mere worker-compensation law. *Id.* This argument completely misses the point of these cases. The key point is that the D.C. Court of Appeals has expressly rejected this Court's construction of the language of a local D.C. law and has *premised* that rejection on its view that this Court has no jurisdiction to countermand it. It is difficult to imagine more compelling circumstances than these for this Court to decide whether it has certiorari jurisdiction to review D.C. Council laws.

Respondents apparently misunderstand this critical relationship between the certiorari jurisdiction issue and the lower court's defiance of this Court's decision in

---

[4] Significantly, the cases which this Court reviewed in *WMATA v. Johnson* itself were in precisely the same posture as the present cases, *i.e.*, the court of appeals (the D.C. Circuit) denied immunity on the basis of the language here at issue and remanded the cases for trial. This Court granted certiorari and reversed, based on the plain meaning of that statutory language. It would surely not be "pragmatic"—in our view it would be perverse—if this Court had jurisdiction thus to establish the District's immunity rule, but had no jurisdiction to enforce that rule.

WMATA v. Johnson, 467 U.S. 925 (1984). For example, they expressly concede that "what may be the most debatable" proposition in Judge Mack's *Estep* dissent is the contention that "it is not at all clear that acts of Congress affecting only the District are 'laws of the United States' within the meaning of Article III." Opp. 15 (quoting Pet. App. 59a).[5] Respondents then say that this proposition "played no part in the court's decision in this case." *Id.* In fact, however, the stated jurisdictional proposition is *central* to the decision in these cases.

The key underpinning of the judgment below—which is *expressly stated* in Judge Mack's opinion in these cases—is that "[o]n a question of purely local law, this court is undeniably the final arbiter." Pet. App. 6a. Plainly, it was only because the court below held itself the "final arbiter" of the statutory language at issue that it could reaffirm its own announced view of that language in *DiNicola*,[6] even though this Court rejected that view in *Johnson*;[7] and just as plainly, the *only*

---

[5] It is charitable for respondents to call this proposition "debatable." In fact, the proposition is flatly contradicted by this Court's square holding in *Whalen v. United States*, 445 U.S. at 684: "Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Article III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute." *Id.* at 687-88.

Significantly, while respondents nowhere even address *Whalen* in their opposition, they appear to agree with us (Pet. 15-16) that for jurisdictional purposes statutes passed by the D.C. Council and approved by Congress should be treated the same as Acts of Congress made applicable only to the District. *See* Opp. 10 ("The council acts by delegation from Congress, true enough").

[6] *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670 (D.C. 1979).

[7] As the court below said in these cases, "[s]ignificantly, the reasoning underlying *Johnson* [was] rejected by our own court in

reason the lower court could logically declare itself the "final arbiter" of the language was its determination that this Court has *no jurisdiction* to review that language. How else would the lower court be the *final* arbiter?

Respondents are therefore wrong to claim that the "only possible question" presented for this Court's review (other than jurisdiction) is "whether the District of Columbia Court of Appeals was egregiously wrong in interpreting the Council's workers compensation statute as it did." Opp. 6. Respondents are also wrong to claim that this question "is not a debatable" one. *Id.* at 13. The former claim simply ignores the important questions presented; the latter claim assumes the answers to those questions.

If this Court *does* have jurisdiction to review the lower court's interpretation of the statute, and if that court was therefore wrong to determine that it is necessarily the "final arbiter" of the statute's language, and if the lower court was bound by this Court's previous determination that that language is "plain" and "clear" on its face,[8] then the lower court did indeed err "egregiously" in presuming to defy this Court. But the stated important questions must be resolved before one can know whether such error occurred;[9] and only because

---

DiNicola . . . ." Pet. App. 6a. The important question raised here is whether the court should have viewed the matter the other way around.

[8] *WMATA v. Johnson*, 467 U.S. at 936, 938.

[9] Although respondents simply assume that this Court would judge the lower court's decision by the "egregious error" standard, this is almost certainly incorrect. That standard is appropriate *only* as to questions "of *exclusively* local concern." *Whalen*, 445 U.S. at 687 (emphasis supplied). Clearly, the important questions presented in the petition are not of such character. Moreover, as we showed in our petition (Pet. 19-20)—a showing respondents ignore—this Court has already determined that the interpretation

respondents have ignored those important questions can they label their own, narrower question "not debatable."

Rather than address the important questions head on, respondents choose instead to belittle our concern over the lower court's failure to follow *Johnson*; they say that failure is, at worst, a form of *lèse majesté*. Opp. 13. Respondents even attempt to belittle *Johnson* itself by saying that the *Johnson* majority "*claimed* faithfulness 'to the plain language of the statute,'" and that while "[t]he six justices of the [*Johnson*] majority . . . may wish their opinion had been found more persuasive by the court of appeals[,] [t]hat is not the issue." Opp. 2, 13 (emphasis supplied). We of course agree that that is not the issue. The real issue is whether *WMATA v. Johnson*—an authoritative decision of the United States Supreme Court, not merely of six Justices—was improperly rejected by the lower court in these cases. Respondents' gratuitous efforts to trivialize that issue cannot serve to answer it, nor undermine its importance.

Contrary to respondents' contentions, this case at bottom is not about a local workers' compensation law at all. It is about the relationship between this Court and the District's highest local court,[10] about the supervisory role

---

of a local D.C. law which incorporates federal statutory language is *not* an exclusively local matter. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). It was presumably for this very reason that the Court had no occasion in *Johnson* itself even to consider the possibility of deferring to *DiNicola*.

[10] While respondents repeatedly imply that the D.C. Court of Appeals should be treated as if it were identical to a State Supreme Court, it in fact is *not* to be so treated, as *Whalen* makes clear. *See* n.2, *supra*. Indeed, as this Court has stated, the nature and role of the District of Columbia "in our governmental structure" is "*sui generis*." *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973).

Congress intended this Court to have over that court,[11] and, ultimately, about the integrity of this Court's own decisions. These are weighty matters.[12] They have raised important questions in these cases. Those questions merit this Court's attention now, not "some day." Opp. 11. The petition should be granted.

CONCLUSION

For the foregoing reasons, and those stated in our petition and the various briefs *amici curiae*, the writ of certiorari should be issued.

---

[11] Congress also intended that the D.C. Council and the Congress make the laws for the District, not the D.C. Court of Appeals. Yet nowhere do respondents even address our contention (Pet. 25-29) that the judgment below effectively "amends" a statute that neither the Council nor the Congress has chosen to amend. Neither do respondents address our showing (Pet. 2 n.16) that the lower court's resort to presumptions about the D.C. Council's supposed knowledge of *DiNicola* was wholly inappropriate where, as here, the statutory language the D.C. Council used (and Congress approved) has been held by this Court to be "plain" on its face. *Johnson*, 467 U.S. at 938.

[12] We by no means suggest that the substantive immunity issue presented by D.C.'s worker-compensation law is itself unimportant. Respondents themselves concede that the issue is a "persistent" one (Opp. 2) and, of course, this Court considered the issue sufficiently important to grant certiorari in *Johnson*. Moreover, as the *amici* briefs filed in these cases show, that issue remains of considerable importance to many parties, including Maryland, Virginia, WMATA, and the Association of Minority Contractors. Nevertheless, as those *amici* argue and as our petition shows, an even more important issue is now raised by the present cases—whether this Court's previous resolution of that substantive issue may be rejected by the lower court.

Respectfully submitted,

EDWIN A. SHERIDAN
DOHERTY, SHERIDAN
& GRIMALDI
8408 Arlington Boulevard
Suite 200
Fairfax, Virginia 22031
(703) 698-7700
Counsel for Petitioner
KBR Corporation

JAMES C. GREGG
MACLEAY & LYNCH, P.C.
1625 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 785-0123
Counsel for Petitioner
Associated Builders, Inc.

JOSEPH P. DYER
JOHN A. SUTHERLAND, JR.
SICILIANO, ELLIS, DYER
& BOCCAROSSE
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692
Counsel for Petitioner
Faith Construction Co.

WALTER A. SMITH, JR.*
ROBERT B. CAVE
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
Co-Counsel for All Petitioners

* Counsel of Record

No. 88-1692

FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

EDWIN A. SHERIDAN
DOHERTY, SHERIDAN & GRIMALDI
8408 Arlington Boulevard
Suite 200
Fairfax, Virginia 22031
(703) 698-7700
Counsel for Petitioner KBR Corporation

WALTER A. SMITH, JR.*
ROBERT B. CAVE
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
Co-Counsel for All Petitioners

* Counsel of Record

[List of Counsel Continued on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

6 pp

JAMES C. GREGG
MACLEAY & LYNCH, P.C.
1625 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 785-0123
Counsel for Petitioner
Associated Builders, Inc.

JOSEPH P. DYER
JOHN A. SUTHERLAND, JR.
SICILIANO, ELLIS, DYER
& BOCCAROSSE
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692
Counsel for Petitioner
Faith Construction Co.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 22.6, petitioners submit this Supplemental Brief to invite the Court's attention to a recent decision bearing directly on the questions raised in their

pending petition. The recent decision is *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 57 U.S.L.W. 4539 (U.S. May 15, 1989).[1] There, as here, the lower court was faced with the question whether to follow a previous decision of this Court construing the particular statutory language at issue; and there, as here, the lower court determined not to follow this Court's decision.

In response, all nine Justices of this Court concluded that the lower court had erred. Five Justices concluded (through an opinion by Justice Kennedy) that when a lower court has before it "a precedent of this Court [that] has direct application in a case," the lower court "should follow the case" even where it "appears to rest on reasons rejected in some other line of decisions." *Id.* at 4541. The "prerogative of overruling" one of this Court's decisions, Justice Kennedy wrote, belongs to this Court alone. *Id.*

The other four Justices of this Court (through an opinion by Justice Stevens) disapproved the lower court's action in even stronger terms. These Justices labeled that action "an indefensible brand of judicial activism." *Id.* (Stevens, J., dissenting). They concluded that "'[A]fter a statute has been construed . . . by this Court . . . it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself.'" *Id.* at 4541 n.1.[2] "'This position,'" Justice Stevens wrote, "'reflects both respect'" for the legislature's role and "'the compelling need to preserve the

---

[1] The decision was handed down after the petition was filed in these cases and became known to petitioners' counsel the day petitioners' reply brief was filed.

[2] *Quoting Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part).

courts' limitd resources.' "[3] Accordingly, once an "earlier opinion [of this Court] gives a statutory provision concrete meaning," it is for the legislature to amend that provision if it disagrees with that meaning. *Id.* at 4541. And, when the legislature does not amend the provision, the judiciary's "duty to respect" the legislature's work product "is strikingly similar to the duty of other federal courts to respect [the Supreme Court's] work product." *Id.*

The foregoing principles—joined in varying degrees by all Members of this Court in *Rodriguez*—apply with special force to these cases. As we showed in our petition, the D.C. Court of Appeals has in these cases refused to follow the "concrete meaning" which this Court in *WMATA v. Johnson*, 467 U.S. 925 (1984), gave to the statutory language here at issue. And the lower court refused to adhere to that "concrete meaning" even though neither the Congress nor the D.C. Council has chosen to amend the language at issue as it applies to the District of Columbia. As the *Rodriguez* case makes clear, such a refusal "constitutes an indefensible brand of judicial activism," a disrespect to the legislatures' prerogative, a disrespect to the work product of this Court, and a threat to the "compelling need to preserve the courts' limited resources." For these reasons alone, the present cases merit this Court's attention.

We recognize, of course, that Justice Stevens' opinion spoke of the respect that "other *federal* courts" owe to this Court. 57 U.S.L.W. at 4541 (emphasis supplied). The central question raised by these cases is whether the D.C. Court of Appeals in fact owes this Court *less* respect than that owed it by the federal district courts and courts of appeals. The Court should grant certiorari to resolve that question in these cases.

---

[3] *Quoting McMahon*, 482 U.S. at 268 (citing *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting) and B. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

Respectfully submitted,

EDWIN A. SHERIDAN
DOHERTY, SHERIDAN
& GRIMALDI
8408 Arlington Boulevard
Suite 200
Fairfax, Virginia 22031
(703) 698-7700
Counsel for Petitioner
KBR Corporation

JAMES C. GREGG
MACLEAY & LYNCH, P.C.
1625 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 785-0123
Counsel for Petitioner
Associated Builders, Inc.

JOSEPH P. DYER
JOHN A. SUTHERLAND, JR.
SICILIANO, ELLIS, DYER
& BOCCAROSSE
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692
Counsel for Petitioner
Faith Construction Co.

WALTER A. SMITH, JR.*
ROBERT B. CAVE
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
Co-Counsel for All Petitioners

* Counsel of Record

MOTION FILED
MAY 18 1989

No. 88-1692

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,
v.
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,
v.
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

FREDERICK B. ABRAMSON *
SACHS, GREENEBAUM & TAYLER
Suite 900
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 828-8225
Counsel for Amicus Curiae National Association of Minority Contractors

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Association of Minority Contractors ("NAMC") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for petitioners to the filing of this brief has been obtained.

The consent of counsel for respondents was requested but refused.

NAMC is a national organization representing minority-owned enterprises principally engaged in the construction industry. NAMC participated as an *amicus* arguing in favor of the result reached by this Court in *WMATA v. Johnson*, 467 U.S. 925 (1984). Indeed, in its decision the Court expressly noted NAMC's strong interest in the issues raised in *Johnson*. *Id.* at 929. In the five years since the *Johnson* decision, NAMC's members have relied on and significantly benefitted from the outcome of that case. The lower court's refusal to follow *Johnson* threatens the interest of NAMC as established in that case.

Most minority contractors are small and/or new companies that are subcontractors or sub-subcontractors that perform small, discrete portions of an overall construction project delegated by a general contractor. The lower court's decision will greatly impede the expansion of minority participation in the construction industry because exposing a general contractor to tort liability for injuries sustained by a subcontractor's employees will diminish, if not destroy, the contractor's willingness and incentive to delegate a portion of its work to minority contractors. Moreover, the lower court's decision will preclude general contractors from using a wrap-up insurance program as a means of providing comprehensive compensation coverage for minority contractors, who, as new entities without established risk/loss histories, have generally been unable to obtain general insurance coverage at rates competitive with the coverage available to more established, larger contractors. Consequently, minority contractors will be precluded from participating in construction projects subject to the District of Columbia Workers' Compensation Act of 1979.

NAMC accordingly submits that its participation as *amicus* will help ensure that the Court is presented with a full exposition of interests that this Court found to be significant in *Johnson* and that have been seriously undermined by the decision below.

Respectfully submitted,

FREDERICK B. ABRAMSON *
SACHS, GREENEBAUM & TAYLER
Suite 900
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 828-8225
Counsel for Amicus Curiae
National Association of
Minority Contractors

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
THE DECISION BELOW WILL UNFAIRLY AND IMPROPERLY PRECLUDE MANY MINORITY CONTRACTORS FROM PARTICIPATING IN CONSTRUCTION PROJECTS IN THE DISTRICT OF COLUMBIA	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

Fullilove v. Klutznick, 448 U.S. 448 (1980) 5
United Steel Workers v. Weber, 443 U.S. 193 (1979) 5
WMATA v. Johnson, 467 U.S. 925 (1984) ..... *passim*

STATUTES AND REGULATIONS

District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) ("1979 Act") 3
49 C.F.R. § 23.45, Appendix A (1987) 6

OTHER AUTHORITIES

General Service Administration's Wrap Up Study, (August 22, 1975) 6
Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13 (June 1977) 6, 7
Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 (December 30, 1977) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Minority Contractors ("NAMC") is a national organization representing minority-owned enterprises principally engaged in the construction industry. NAMC participated as an *amicus* in this Court's *Johnson* decision and argued in favor of the result reached by the Court in that case. Indeed, in the course of its decision, the Court expressly noted NAMC's strong interest in the outcome of the case, *WMATA v. Johnson*, 467 U.S. 925, 929 (1984), and in the five years since the decision NAMC's members have relied on and significantly benefited from it. Through its brief here, NAMC seeks to preserve its interest as established in *Johnson* and to overturn the lower court's refusal to follow that decision.

Most minority contractors are small and/or new companies that have been able to compete with the more established and larger companies only through federal assistance and innovative methods of removing financial impediments. Often minority contractors are not only subcontractors, but sub-subcontractors performing a small, discrete portion of an overall project that might have been performed by the delegating contractor. By exposing a general contractor to tort liability for any injuries suffered by the minority subcontractor's employees, the decision below seriously diminishes and may well destroy a contractor's willingness and incentive to delegate a portion of its work to small minority concerns. As a result, the decision below will greatly impede expansion of minority participation in the construction industry.

The decision below will also harm minority participation because of its adverse effect on one of the most serious barriers faced by minority contractors—the ability to obtain insurance. Because they are often new entities without established risk/loss histories, minority contractors have generally been unable to obtain general

insurance coverage at rates competitive with the coverage available to the more established, larger contractors. Partly as an effort to address this problem, the federal government has recommended the use of wrap-up insurance programs such as that used in *Johnson* and often used by principal contractors.[1] The decision below, however, would preclude general contractors, such as the current petitioners,[2] and, the amicus, Washington Metropolitan Area Transit Authority, from employing a wrap-up insurance program as a means of providing comprehensive compensation coverage for minority contractors under the District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) ("1979 Act"). Because most minority contractors cannot obtain individual insurance coverage at competitive rates, the effect of the decision below will be to preclude them from participating in construction projects subject to the 1979 Act by resurrecting the financial barriers wrap-up insurance had removed.

Accordingly, the decision below has exacerbated the serious problems already inflicted upon minority contractors by the executive branch's continued reduction of federal assistance for construction projects. Because

---

[1] *See* pp. 6-8, *infra*. Wrap-up insurance programs provide that the overall general contractor purchases insurance coverage for all contractors, subcontractors and, as frequently is the case with minority contractors, sub-subcontractors. This removes the cost of insurance as a factor in submitting a bid, by eliminating differences resulting from the insurance industry's evaluation of a particular contractor's risk of loss.

[2] While the Petitioners here did not utilize wrap-up insurance, the decision below provides immunity only to an immediate employer that purchases compensation coverage. In the case of wrap-up programs, the decision below would expose *all* subcontractors (including the immediate employer) to tort suits, thus making a wrap-up program completely impractical. *See* Pet. App. 15a. Indeed, if the *Meiggs* immunity rule had been applied in the *Johnson* litigation, this would have meant creating over 1000 potential defendants. *See Johnson*, 467 U.S. at 927.

such judicial action effectively diminishes the participation of minority concerns in the construction industry, NAMC urges the Court to grant certiorari and reverse the decision.

SUMMARY OF ARGUMENT

The decision below improperly rejects this Court's construction of the statutory language at issue and, unless reversed, will seriously curtail recent efforts to increase minority participation in the construction industry. The decision thereby defeats the strong federal interest in securing the maximum participation of minorities in business enterprises and in ensuring that District of Columbia employees are covered by compensation insurance at all times.

ARGUMENT

THE DECISION BELOW WILL UNFAIRLY AND IMPROPERLY PRECLUDE MANY MINORITY CONTRACTORS FROM PARTICIPATING IN CONSTRUCTION PROJECTS IN THE DISTRICT OF COLUMBIA.

In the decision below, the District of Columbia Court of Appeals has found that contractors should be liable for tort suits brought against them by their subcontractors' employees (already compensated by workers' benefits) through its interpretation of the *exact same statutory language* that this Court held entitled such contractors to employers' immunity. *See Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. at 939-40. The Court of Appeals (like the reversed D.C. Circuit in *Johnson*) based its ruling on its policy concerns about the "humane purpose" of the statute. Pet. App. 15a-16a. As petitioners note, it is the D.C. Council and the Congress that have the duty of weighing such policy considerations, not the D.C. Court of Appeals. Pet. 25-26. Moreover, consideration of policy concerns involves the balancing of the interests of *all* affected parties—employees *and* employers—subcontrac-

tors *and* general contractors. Here, the D.C. Court of Appeals made no mention of and apparently never considered the interests of minority contractors.

By exposing general contractors to tort liability, the decision below harms minority contractors in several ways. If the decision below is allowed to stand, contractors will obviously seek to limit their liability by performing more of the work through their own employees. This will necessarily harm minority contractors who, as subcontractors, often have a very small share of the general contractors project—shares that may be taken over and performed by larger contractors.

Even where the contractor is compelled by statute or conscience to use minority concerns, only the more established larger minority firms will likely receive the work because the decision below destroys the concept of wrap-up insurance in the District of Columbia and thus will preclude many minority contractors from effectively competing for construction subcontracts. Indeed, this Court specifically recognized this risk in *Johnson* when it noted that "many minority subcontractors [are] unable to afford or lack[] sufficient business experience to qualify for their own workers' compensation insurance policies." 467 U.S. at 929. The D.C. Court of Appeals decision will therefore exacerbate the already serious racial imbalance in the construction industry. *See, e.g., United Steel Workers v. Weber*, 443 U.S. 193, 198 n.1 (1979) (collecting such findings).

This elimination of minority contractors from projects subject to the 1979 Act is directly contrary to the efforts of the federal government to increase minority participation in the construction industry.[3] For example,

---

[3] *See Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980) (noting that Congress has acted to eliminate "barriers to minority firm access to public contracting opportunities" in order "to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments").

the Urban Mass Tranportation Administration has expressly recommended wrap-up programs as a means of reducing the financial barriers that typically bar participation of minority concerns. In fact, the Urban Mass Transportation Administration directs applicants for federal funds to consider "providing wrap-up insurance for contractors and subcontractors" as a means "to overcome barriers to [minority program participation]." Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 at 14 (December 30, 1977). *Accord*, 49 C.F.R. § 23.45, Appendix A (1987).

Furthermore, a detailed study of wrap-up programs performed for the United States General Services Administration recommended the use of wrap-up programs for all projects exceeding $20 million in total costs, and expressly recognized that such programs maximize the participation of minority concerns. General Service Administration's Wrap Up Study, p. 14, 17 (August 22, 1975). A similar study performed for the United States Department of Transportation also recommended the implementation of wrap-up insurance programs for all major construction projects, again noting that such coverage is the only practical way that minority concerns can effectively compete for subcontracts on such projects. Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13, at p. 1-21 (June 1977).

The principal advantage to minority contractors of wrap-up or similar insurance is that it eliminates the cost of insurance when bidding on a project. The fledgling status of many minority contractors makes them an unknown risk to insurance companies. Additionally, minority contractors are often undercapitalized, having little equity with which to guarantee the continuous and timely payment of premiums. It is a natural commercial response on the part of the insurance industry to charge

an increased premium to such concerns. Unfortunately, these new concerns lack the profit margins of more established firms, and the additional cost of paying insurance premiums will frequently make the difference between a successful or unsuccessful competitive bid.

For those minority contractors that make successful bids, it is probable that some employees will be subjected to periods without compensation coverage, which is a result obviously contrary to the principal "humane" purpose of the 1979 Act. Many new minority contractors do not have the commercial experience and knowledge of the insurance industry to calculate accurately the cost of insurance when submitting a bid that may be two or three years in anticipation of actual work. The premiums for compensation coverage, already high, can sharply increase over the lifetime of a contract because of legislative action and actual loss experience. Premiums for compensation insurance constitute a substantial portion of the bid price of a construction contract.[4] If a minority contractor miscalculates the cost of premiums (or any other such substantial cost), the contractor will be faced with the dilemma of making a payroll or paying insurance premiums. The pressures to take the first option are obvious. Any missed premiums result in the termination of insurance, thereby exposing employees to periods without coverage for compensation.

Another factor causing lapses in insurance coverage is the utilization of financially uncertain insurance companies. It is an unfortunate fact of commercial life that minority contractors are not attractive as customers for established insurance carriers. Many minority contractors are forced to use smaller, fiscally weak insurance companies because they are the only carriers willing to provide them coverage. Some of those carriers can and do fail for various reasons, again exposing employees to periods without coverage.

---

[4] *See* Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13 at p. 4-1.

It is not our view, of course, that the court below should necessarily have weighed the concerns of minority contractors in construing the statutory language at issue. Rather, our view is that once a court begins to act as a legislature and construe language based on policy concerns—rather than on the basis of the plain words of the statute—it will inevitably overlook and undermine certain critical policy concerns. That is what has happened here, thereby underscoring the importance of this Court's admonition—repeated in *Johnson* itself—that the court's role is to adhere strictly to the words of the statute. 467 U.S. at 934. That admonition should have had special force where, as here, this Court has already definitively determined that the meaning of those words is "clear" and "plain" on the face of the statute. Because the court below refused to accept that meaning, and because that refusal has upset important interests acknowledged by this Court in *Johnson*, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the National Association of Minority Contractors respectfully urges the Court to grant the petition for a writ of certiorari and to reverse the decision below.

Respectfully submitted,

FREDERICK B. ABRAMSON *
SACHS, GREENEBAUM & TAYLER
Suite 900
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 828-8225
Counsel for Amicus Curiae
National Association of
Minority Contractors

* Counsel of Record

MOTION FILED
MAY 18 1989

No. 88-1692

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,
v.
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,
v.
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ROBERT L. POLK *
ARNOLD I. MELNICK
ROBERT J. KNIAZ
600 5th Street, N.W.
Washington, D.C. 20001
(202) 962-1275
Counsel for Amicus Curiae Washington Metropolitan Area Transit Authority

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

MOTION OF THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Washington Metropolitan Area Transit Authority ("WMATA") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for

petitioners to the filing of this brief was obtained. However, the consent of counsel for respondents was refused.

WMATA is the mass transit agency serving the Washington, D.C. metropolitan area that was created with Congress' approval by an Interstate Compact whose signatories include the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. Since the early 1970s, WMATA, which is responsible for constructing and operating the Metrorail transit system, has employed a wrap-up insurance program to guarantee workers' compensation coverage. Under this wrap-up program, WMATA, instead of its individual subcontractors, acquires workers' compensation coverage for *all* Metrorail construction laborers by purchasing a single, comprehensive insurance policy.

In *WMATA v. Johnson*, 467 U.S. 925 (1984), this Court specifically concluded that under the plain language of the District of Columbia Workmen's Compensation Act of 1928 WMATA's wrap-up program entitled it to immunity from tort liability for injuries sustained by its subcontractors' employees. In the five years since the *WMATA v. Johnson* decision, WMATA has continued its wrap-up program in reliance on that decision. However, the lower court's refusal to follow this Court's construction of the same statutory language that was at issue in *Johnson* jeopardizes the continued utility of WMATA's wrap-up program. If WMATA is liable for injuries to subcontractors' employees notwithstanding the fact that it has secured compensation benefits for those workers, the wrap-up coverage would be uneconomical for WMATA. Furthermore, the threat of unexpected millions of dollars in tort liability will pose serious budgetary problems for WMATA and threaten the stability and financial integrity of transportation services in the Washington metropolitan area.

Accordingly, WMATA submits that its participation as *amicus* will aid the Court's understanding of the im-

portant interests that are affected by the *Johnson* decision and that are now seriously threatened by the lower court's decision.

Respectfully submitted,

ROBERT L. POLK *
ARNOLD I. MELNICK
ROBERT J. KNIAZ
600 5th Street, N.W.
Washington, D.C. 20001
(202) 962-1275
Counsel for Amicus Curiae
Washington Metropolitan
Area Transit Authority

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	2
A. Introduction	2
B. WMATA's Worker-Compensation Program	2
C. WMATA's Judicial Defense of Its Worker-Compensation Program	4
D. The Importance of *Johnson* to WMATA	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. The Decision Below Violates the Doctrine of *Stare Decisis* by Failing to Adhere to this Court's Definitive Construction of the Statutory Language at Issue	8
II. The Decision Below Would Severely Undermine the Longstanding Workers' Compensation Programs Employed by WMATA and Other General Contractors in the District of Columbia	10
III. These Cases Constitute Unauthorized Policy-making by the Court Below	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

	Page
Allen v. United States, 625 F. Supp. 841 (D.D.C. 1986)	8
Chan v. Korean Air Lines, Ltd., 57 U.S.L.W. 4432 (April 18, 1989)	14
Estep v. Construction General, Inc., C.A. No. 126-81 (D.C. Sup. Ct. April 3, 1985)	9
Estep v. Construction General, Inc., 546 A.2d 376 (D.C. 1988)	5, 9
Ford v. United States, No. 84-3082 (D.D.C. March 22, 1985)	8
Frazier v. Faith Construction Co., C.A. No. 6602-84 (D.C. Sup. Ct. July 23, 1985)	9
Hatter v. George A. Fuller Co., C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984)	9
Hobbs v. KBR Corp., C.A. No. 803-84 (D.C. Sup. Ct. Nov. 19, 1985)	9
Holmes v. Leon N. Weiner & Associates, 603 F. Supp. 122 (D.D.C. 1985)	8
In re Metro Subway Accident Referral, 630 F. Supp. 385 (D.D.C. 1984), *aff'd*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987)	8
Keener v. WMATA, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)	5, 8
Meiggs v. Associated Builders, Inc., C.A. No. 2563-84 (D.C. Sup. Ct. May 1, 1985)	8
O'Connell v. Maryland Steel Erectors, Inc., 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986)	5
Stokes v. George Hyman Constr. Co., No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir. Jun. 24, 1985)	8
The Amiable Isabella, 19 U.S. (6 Wheat.) 1 71 (1821)	14
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980)	9
United States v. Maine, 420 U.S. 515 (1975)	9
WMATA v. Johnson, 467 U.S. 925 (1984)	*passim*

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

	Page
District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) (repealed 1982)	5
District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981)	5
National Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982 & Supp. IV 1986)	5
Urban Mass Transportation Act of 1964, § 12, 49 App. U.S.C.A. § 1615(f) (Supp. 1989)	3
Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966)	2
49 C.F.R. §§ 23.1 *et seq.* (1987)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1692

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

A. Introduction.

The Washington Metropolitan Area Transit Authority ("WMATA") is the mass transit agency serving the Washington, D.C. metropolitan area. WMATA is an interstate agency created with Congress' approval by the Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), whose signatories included the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. It is this Court's decision in favor of WMATA in *WMATA v. Johnson*, 467 U.S. 925 (1984)—along with the lower court's refusal to follow that decision in the present cases—that forms the centerpiece of the present petition for a writ of certiorari. Because WMATA has placed great reliance on the *Johnson* decision, because the lower court's refusal to follow that decision threatens WMATA's ability to ensure continued compensation benefits to injured workers, and because that refusal may also jeopardize WMATA's delivery of transportation services in the Washington area, WMATA strongly supports the petition.

B. WMATA's Worker-Compensation Program.

WMATA is responsible for constructing and operating the public transportation system in and around the Nation's Capital, including the rapid transit system popularly known as Metrorail. Primarily as a result of the still-ongoing construction of the Metrorail system, WMATA has become one of the Washington metropolitan area's largest general contractors, contracting with literally scores of subcontractors to carry out the actual construction of the system. In its capacity as the general contractor for the Metrorail system, WMATA has consistently met its obligations under the District of Columbia's workers' compensation statutes to secure workers' compensation for the employees of its subcontractors.

Beginning in the early 1970s, WMATA departed from its prior practice of allowing each individual subcontractor to purchase workers' compensation insurance for its own employees, and adopted instead a centralized insurance program known as a "wrap-up" program. Under its wrap-up approach to guaranteeing compensation, WMATA, rather than its individual subcontractors, actually acquires workers' compensation coverage for *all* Metrorail construction laborers by purchasing a single, comprehensive insurance policy. Wrap-up programs like WMATA's are now commonplace in large-scale construction projects in the District of Columbia.

WMATA adopted its wrap-up approach for several reasons. First, WMATA's prior experience was that many of its subcontractors, most notably many of its minority subcontractors,[1] were unable to obtain and/or qualify for individual workers' compensation insurance policies. The wrap-up approach eliminates this problem. In addition, a centralized wrap-up policy ensures that coverage for injured employees is both comprehensive and continuous, whereas under a system in which individual subcontractors obtain insurance, individual policies may lapse without the general contractor having knowledge of the resultant gap in employee coverage.

Moreover, a wrap-up policy is beneficial to employees and the courts, since a single insurance policy obtained by the general contractor eliminates the need for courts to referee disputes as to which entity in the chain of contractors—*e.g.*, the subcontractor or the general contractor—should pay for a particular worker's injuries. Under a wrap-up policy, employees who can make the requisite demonstration of work-related injuries directly

---

[1] Because it receives federal funding, WMATA is charged with ensuring that minority business enterprises have a full opportunity to participate in construction of the Metrorail system. *See* Urban Mass Transportation Act of 1964, § 12, 49 App. U.S.C.A. § 1615(f) Supp. 1989; 49 C.F.R. §§ 23.1 *et seq.* (1987).

qualify for compensation under the general contractor's policy without having to first demonstrate that their immediate employers, the subcontractors, had affirmatively defaulted on their separate obligation under the statute to secure compensation. In addition, a wrap-up policy is preferable because, in WMATA's experience, a single insurance policy incurs smaller premiums than would be the case if the numerous subcontractors independently had to purchase separate insurance policies.

Finally, WMATA adopted the wrap-up approach to compensation with the understanding that it would be entitled to the immunity from tort suits brought by injured subcontractor employees that the District workers' compensation laws bestow upon those entities that do not default on their statutory duty to secure workers' compensation. As this Court recognized in *WMATA v. Johnson*, this immunity is the *quid pro quo* that underlies all workers' compensation programs: in return for guaranteeing that compensation will be available to injured employees, employers or contractors are immunized from tort suits by those employees for those same injuries. 467 U.S. at 931-32.

C. WMATA's Judicial Defense of Its Worker-Compensation Program.

WMATA has had its wrap-up program in place for over 15 years. When necessary, WMATA has moved vigorously in the courts to protect the integrity of the program and its entitlement to immunity under it. Thus, WMATA was the prevailing party in this Court's 1984 *Johnson* decision, which definitively construed the District's statutory language in question to confer immunity upon general contractors such as WMATA. *See WMATA v. Johnson*, 467 U.S. at 940-41. Similarly, WMATA took the lead, either as a named party or as *amicus curiae*, in the extensive litigation following the *Johnson* decision which has confirmed that *Johnson*'s rule of immunity is still applicable in the District of Columbia notwithstand-

ing Congress' 1984 amendments to the National Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982 & Supp. IV 1986), which were aimed at legislatively nullifying the *Johnson* decision at the national level. *See, e.g., Keener v. WMATA*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Estep v. Construction General, Inc.*, 546 A.2d 376 (D.C. 1988) Petitioners' Appendix ("Pet. App.") 42a-70a.[2]

Having successfully defended the integrity of its wrap-up program in the *Johnson/Keener/Estep* line of cases that arose under the District's 1928 workers' compensation statute (the "1928 Act"),[3] WMATA has also participated as an *amicus curiae* in the instant litigation, which arises under the District's current workers' compensation law (the "1979 Act").[4] Because the 1979 Act adopted virtually verbatim the precise statutory language construed in the *Johnson*, *Keener*, and *Estep* cases, WMATA has vigorously contended that this Court's construction of that language should be followed, in the absence of any affirmative indication that the legislature intended that language to mean something different in the 1979 Act than it meant in the predecessor 1928 Act. Now, however, the lower court has held in two contradictory decisions that while the 1928 Act grants WMATA immunity (*Estep v. Construction General*), the same statutory language in the 1979 Act denies immunity (the decision below).

---

[2] WMATA also participated in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986), which was the first appellate decision to reject the contention that the 1984 amendments to the National Longshore Act applied to cases arising under the District's compensation statute.

[3] District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) (repealed 1982).

[4] *See* District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981).

D. The Importance of *Johnson* to WMATA.

In the five years since this Court's *Johnson* decision, WMATA has continued its wrap-up program in reliance on that decision. WMATA has expended approximately $19.5 million to secure its wrap-up insurance policies during that time. Now, however, the utility of WMATA's wrap-up program is in serious jeopardy as a result of the opinion below, which holds, *in direct contradiction to this Court's Johnson decision*, that WMATA is liable for injuries to subcontractor employees notwithstanding the fact that it has secured workers' compensation benefits for those workers. Plainly, if WMATA is to receive no *quid pro quo* immunity in exchange for acquiring workers' coverage, that full coverage makes no economic sense to WMATA. Moreover, the threat of unexpected, untold millions of dollars in tort liability not only will pose enormous budgetary problems for WMATA and its signatories, but it may also threaten the stability and financial integrity of transportation services in the Washington metropolitan area.[5]

---

[5] WMATA's records show that approximately 1500 compensation claims have been filed against WMATA by injured subcontractor employees under the 1979 Act. With the construction of several segments of the Metrorail system still underway or planned, this figure will inevitably swell in the future. Based upon past patterns of tort filings in similar circumstances, WMATA could reasonably be expected to face at least a hundred million dollars in tort claims by the injured employees if WMATA is held not to be entitled to immunity under the 1979 Act by virtue of having secured compensation through the wrap-up program.

Under WMATA's budgetary procedures, any payments for tort damages would come from WMATA's construction funds. Diverting significant amounts of construction monies to tort payments would severely curtail WMATA's construction obligations. The resulting budgetary difficulties as a practical matter could be remedied only by contributions from the treasuries of the Signatories of the WMATA Compact. In this era of budgetary restraints at the state and local level and strong public opposition to governmental revenue increases of any kind, such a funding alternative realistically cannot be counted on to resolve tort-related funding short-

For all these reasons, WMATA has a paramount interest in these cases and in the protection of the *Johnson* decision.

SUMMARY OF ARGUMENT

In addition to flouting this Court's construction of the statutory language here at issue, the lower court's decision does violence to the principle of *stare decisis* and to the important interests that principle protects. WMATA and similarly-situated contractors have relied on the *Johnson* decision to put in place costly—and highly beneficial—worker-compensation programs. The lower court's purported rejection of *Johnson* is not only unfair to these contractors, but it also constitutes a misuse of judicial resources for that court to have relitigated the meaning of language *Johnson* found to be "plain."

Moreover, this purported rejection of *Johnson* will undermine the very purposes that worker's compensation statutes such as the District of Columbia's 1979 Act were designed to serve. Indeed, as *Johnson* itself made clear, the denial of immunity in cases such as the present ones will lead to gaps in worker coverage and needless legal disputes over which entity was responsible for that coverage—all to the detriment of injured workers in need of swift, sure compensation benefits.

Finally, these cases represent another instance of the kind of judicial legislation this Court has repeatedly condemned—lower courts implementing their own notions of wise policy in the face of plain language *the legislature* has adopted.

For all these reasons, in addition to those contained in the petition, the writ should be granted and the judgment below reversed.

---

falls. The result in such circumstances would then almost certainly lead to cutbacks in WMATA's overall services—to the detriment of the entire citizenry of (and many visitors to) the Washington metropolitan area.

ARGUMENT

I. The Decision Below Violates the Doctrine of *Stare Decisis* by Failing to Adhere to this Court's Definitive Construction of the Statutory Language at Issue.

The basic question presented by these cases—whether general contractors who do not default on their duty to secure workers' compensation are entitled under the statutory language in question to immunity from tort actions—has now been litigated before several courts, including this Court, for nearly a decade. This protracted litigation has arisen under both the District of Columbia's 1928 compensation statute and the 1979 Act, which have virtually identical statutory language. The courts that have considered this question have, at *every* level, ruled in favor of contractor immunity, including this Court in *WMATA v. Johnson*, 467 U.S. at 940; the United States Court of Appeals for the District of Columbia Circuit;[6] several Judges of the United States District Court for the District of Columbia;[7] several Judges of the Superior Court of the District of Columbia;[8] and even another division of the District of Co-

---

[6] *See Keener v. WMATA*, 800 F.2d 1173.

[7] For example, each of the five United States District Court Judges who ruled in the cases at issue in the consolidated *Johnson* litigation found in favor of contractor immunity. *See Johnson*, 467 U.S. at 930-31. *See also, e.g., In re Metro Subway Accident Referral*, 630 F. Supp. 385 (D.D.C. 1984), *aff'd*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987) (1928 Act case); *Holmes v. Leon N. Weiner & Associates*, 603 F. Supp. 122 (D.D.C. 1985) (1928 Act case); *Ford v. United States*, No. 84-3082 (D.D.C. March 22, 1985) (1979 Act case); *Stokes v. George Hyman Constr. Co.*, No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir. Jun. 24, 1985) (1979 Act case). *Contra, Allen v. United States*, 625 F. Supp. 841 (D.D.C. 1986) (1979 Act case).

[8] *E.g., Meiggs v. Associated Builders, Inc.*, C.A. No. 2563-84 (D.C. Sup. Ct. May 1, 1985) (Pet. App. 18a) (1979 Act case);

lumbia Court of Appeals in a decision handed down on the *same day* as the opinion below.[9] Yet despite these precedents, and, most importantly, in the face of this Court's authoritative decision in *Johnson*, the division of the District of Columbia Court of Appeals that considered the present cases reached a contrary result, holding that general contractors such as WMATA are *not* entitled to tort immunity.

The Court of Appeals' attempt to deviate from the series of decisions upholding contractor immunity under the District of Columbia's workers' compensation laws should not be sanctioned. It not only contradicts this Court's definitive construction of the statutory language at issue, but it also runs directly counter to the doctrine of *stare decisis*, a fundamental principle of American law that counsels strongly against re-litigation of already-settled issues, particularly when reopening decided questions would disrupt settled commercial practices. *E.g.*, *United States v. Maine*, 420 U.S. 515, 527-528 & n.9 (1975).[10] Where, as here, not only this Court

---

Frazier v. Faith Construction Co., C.A. No. 6602-84 (D.C. Sup. Ct. July 23, 1985) (Pet. App. 20a) (1979 Act case); *Estep v. Construction Gen'l, Inc.*, C.A. No. 126-81 (D.C. Sup. Ct. April 3, 1985) (1928 Act case); *Hatter v. George A. Fuller Co.*, C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984) (1928 Act case). *Contra*, *Hobbs v. KBR Corp.*, C.A. No. 803-84 (D.C. Sup. Ct. Nov. 19, 1985) (Pet. App. 23a) (1979 Act case).

[9] *See Estep v. Construction General, Inc.*, Pet. App. 42a.

[10] *Accord, Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980):

> [*Stare decisis*] not only plays an important role in orderly adjudications; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rights. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.

Id. at 272.

but several other courts have construed the language at issue to mean one thing over a period of several years, it is simply too late in the day for a division of the District of Columbia Court of Appeals to decide unilaterally that the langauge means just the opposite.

By refusing to follow this Court's analysis in *Johnson*, the court below has upset the settled expectations of WMATA and all other general contractors in the District of Columbia who have secured compensation in the belief that they would receive statutory immunity from subcontractor employee tort suits in return. Such an outcome, if allowed to stand, would be highly inequitable—particularly to WMATA, which has expended considerable time, effort and funds in litigation over the last several years to establish the contractor immunity precedents set forth in the *Johnson/Keener/Estep* line of cases. Accordingly, this Court should grant the petition and reverse the decision below in order to protect the justified expectations of general contractors in the District of Columbia, to avoid the disruptions to ongoing commercial practices that would be caused by reopening settled questions of law, and to maintain the integrity of this Court's own precedent.

II. The Decision Below Would Severely Undermine the Longstanding Workers' Compensation Programs Employed by WMATA and Other General Contractors in the District of Columbia.

In addition to violating the rule of *stare decisis*, the decision below should be overturned in light of the adverse impact it will have on the willingness of general contractors to secure workers' compensation insurance policies in the District of Columbia. As was explained in the "Interest of *Amicus Curiae*" section above, many general contractors in the District have followed WMATA's lead in securing compensation for subcontractor employees through the purchase of wrap-up

workers' compensation insurance policies. In its own case, WMATA has been willing to undertake responsibility for securing compensation for *all* the workers involved in the construction of the Metrorail subway system because of its understanding that such an undertaking would entitle it to immunity from tort actions by any such employees who are injured during the course of their work. If the decision below is allowed to stand and general contractors such as WMATA are not entitled to such immunity under the 1979 Act through purchase of a wrap-up policy, the incentives for purchasing wrap-up insurance would largely disappear, and the workers' compensation arrangements for large-scale construction projects in the District of Columbia could revert to the balkanized, inefficient approach followed in prior years.

As this Court recognized in the *Johnson* decision, the wrap-up approach to compensation for major construction projects offers numerous advantages to several interested parties, all of which could be lost if the utility of wrap-up programs is undercut by the decision below. As Justice Marshall correctly observed in the *Johnson* opinion:

> if the benefits of securing compensation insurance—that is, tort immunity—did not accrue to contractors until subcontractors had affirmatively elected to default, then contractors would be reluctant to incur the considerable expense of securing compensation insurance until they are absolutely convinced that subcontractors were in statutory default. Inevitably, such a rule would create gaps in workers' compensation coverage . . . . [*Johnson*, 467 U.S. at 938.]

Thus, the decision below is harmful to *employees* as well as contractors, since it is the injured workers who suffer most if gaps in compensation coverage occur.

Moreover, such gaps in coverage as a practical matter are highly likely to occur in any complex, multi-faceted

construction project. As the Court found in *Johnson*, inasmuch as many subcontractors are small businesses, it is frequently the case that many such firms—particularly minority subcontractors—are "unable to afford or [lack] sufficient business experience to qualify for their own workers' compensation insurance policies." *Id.* at 929.[11] Gaps in compensation coverage might also occur if general contractors no longer have an incentive to purchase wrap-up policies because subcontractors on occasion allow their individual insurance policies to expire, or find that their insurance carriers have gone out of business. *Id.* Even the most diligent efforts of general contractors such as WMATA to monitor events in order to forestall gaps in statutory coverage historically have proven to be unable to forestall such gaps, given the complexity of large-scale construction projects and the numerous subcontractors involved in those projects. *Id.*

Employees, as well as the courts, benefit from adoption of wrap-up policies by general contractors in another significant way as well. When a general contractor secures a single workers' compensation insurance policy, an injured employee has no doubt where to obtain his or her workers' compensation benefits. Under the approach adopted by the court below, however, general contractors would be liable to provide compensation only upon a showing by the injured employee that his or her immediate employer, the subcontractor, had affirmatively defaulted on its own statutory obligation to secure compensation. This result is a virtual invitation to extensive and costly litigation over this issue in many future individual compensation claims. As this Court held in *Johnson*, there simply is nothing in the statutory lan-

---

[11] The frequent inability of minority contractors to obtain workers' compensation insurance in the past was particularly troublesome to WMATA, given its statutory duty to provide such businesses with a full opportunity to participate in construction of the Metrorail system. *See* note 1, *supra*.

guage which suggests that the legislature "intended to unleash such a difficult set of factual inquiries" upon injured employees. *Id.* at 939. Moreover, the avoidance of such burdensome litigation through purchase of wrap-up policies by general contractors has been most helpful to the nation's trial courts, which are already suffering from overcrowded dockets.

Thus, in addition to the financial savings afforded to contractors who procure wrap-up insurance policies, *id.* at 928, such policies provide significant benefits to injured employees, subcontractors, minority businesses, and the courts. The decision below, however, subverts all of these beneficial outcomes in favor of a strained construction of the statute that is at variance with the decisions of numerous other courts—including this Court in *Johnson*—that have construed the language in question to be plain and to bestow immunity on general contractors such as WMATA.

III. These Cases Constitute Unauthorized Policy-making by the Court Below.

The outcome in these cases is all the more troublesome because it smacks of little more than judicial legislation. As the petitioners point out, proposals to amend the 1979 Act to nullify the rule of contractor immunity have been introduced in the last two sessions of the D.C. Council; no action has been taken on those bills, however. *See* Pet. at 29 n.24. WMATA has monitored these legislative initiatives because of their potentially significant impact on WMATA if adopted, only to find that the normal workings of the legislative process have been superseded by the Court of Appeals' decision construing the plain statutory language in question to mean the opposite of what this Court said it meant (and that the authors of the proposed amendments to the 1979 Act necessarily viewed it to mean).

As Justice Scalia recently stated for the Court, "where the text is clear," courts "have no power to insert an amendment" because to do so—as the court below did here—is "to make, and not to construe," the law. *Chan v. Korean Air Lines, Ltd.*, 57 U.S.L.W. 4432, 4436 (April 18, 1989) (*quoting The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.). WMATA therefore agrees with the petitioners that this Court should grant the writ to confirm that if general contractors are to be stripped of immunity in the District of Columbia, that is a task properly left to the people's elected representatives, and not the courts.

CONCLUSION

For the reasons set forth above, as well as those set forth in the petition, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

ROBERT L. POLK *
ARNOLD I. MELNICK
ROBERT J. KNIAZ
600 5th Street, N.W.
Washington, D.C. 20001
(202) 962-1275
Counsel for Amicus Curiae Washington Metropolitan Area Transit Authority

* Counsel of Record